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NO.

IN THE SUPREME COURT

OF THE

UNITED STATES

APRIL TERM, 1981

GLEN DeRONDE,

Petitioner,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, RONELL L. GORDON, DEAN OF ADMISSIONS UNIVERSITY OF CALIFORNIA, DAVIS DAVIS SCHOOL OF LAW,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Were the admissions procedures of a State University Law School permitting the consideration of "ethnic minority status" violative of the equal protection guarantees afforded nonminorities under the Federal Constitution, 42 USC 1981, 1982, 2000(e)?

A. Does the Fourteenth Amendment to the United States Constitution, equal protection clause, and 42 USC 1981, 1983 and 2000(e) require that the admissions procedures of a State University Law School be "color-blind"?

B. If the admissions procedures of a State University Law School can consider the competitive use of race in passing upon applications for admission, must not the race of <u>all</u> applicants (vis a vis each other) be considered to encourage diversity within the institution?

2. Were the admissions procedures of a State University Law School permitting consideration of "ethnic minority status" violative of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution "as applied"?

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Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner GLEN DeRONDE, respectfully prays that a Writ of Certiorari issue to review the decision rendered by the California Supreme Court entered in this case on February 11, 1981 (Petition for Rehearing

denied by Order on March 11, 1981) upholding the use of a racial preference scheme for certain select races in University of California admissions.

OPINIONS BELOW

The opinion of the California Supreme Court (App. A infra) is reported at 28 Cal. 3d 875. A modification of the Dissenting Opinion is attached hereto (App. B, infra). The order denying your Petitioner's Petition for Rehearing appears attached hereto (App. C, infra). The Judgment of the California Supreme Court was duly entered by the Clerk of the Yolo County Superior Court on March 18, 1981 in Yolo County (App. D, infra).

JURISDICTION

The opinion of the California Supreme Court was rendered on February 11, 1981. A Petition for Rehearing was denied on March 11, 1981. The judgment became final on March 18, 1981. Said judgment is the final judgment of the highest court of the State of California. Hence, jurisdiction of this court is invoked pursuant to 28 USC 1257 et. seq. Jurisdiction of the Supreme Court of the United States is also invoked

under 42 USC 1981, 1983, 2000(e), and the United States Constitution Amendment XIV.

HOW A FEDERAL QUESTION IS PRESENTED

Petitioner herein sought review of the admissions policy and procedures of the University of California in the Superior Court of the State of California in and for the County of Yolo, requesting a declaration that the same were unconstitutional pursuant to the Fourteenth Amendment of the United States Constitution, and 42 USC 1981, 1983, 2000(e). Said federal questions were raised in the Supreme Court of the State of California as assignments of error. The Supreme Court of the State of California passed upon the validity of the admissions program of the University of California pursuant to United States Constitution Amendment XIV. The Supreme Court of the State of California did not pass upon the validity of the admissions program of the University of California based upon 42 USC 1981, 1983, 2000(e).

QUESTIONS PRESENTED

1. Were the admissions procedures of a State University Law School permitting the consideration of "ethnic minority status" violative of the equal pro-

tection guarantees afforded nonminorities under the Federal Constitution, 42 USC 1981, 1982, 2000(e)?

A. Does the Fourteenth Amendment to the United States Constitution, equal protection clause, and 42 USC 1981, 1983 and 2000(e) require that the admissions procedures of a State University Law School be "color-blind"?

B. If the admissions procedures of a State University Law School can consider the competitive use of race in passing upon applications for admission, must not the race of all applicants (vis a vis each other) be considered to encourage diversity within the institution?

2. Were the admissions procedures of a State University Law School permitting consideration of "ethnic minority status" violative of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution "as applied"?

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and statutes are: U.S. Const. Amend. XIV; 42 U.S.C. §§1981, 1983 and 2000(e), et seq.; all of which are set forth seriatim herein (Appendix E, infra).

STATEMENT OF THE CASE

This is an action brought by a white male applicant to the 1975 University of California at Davis Law School[1] who sought mandamus in the Superior Court of the State of California, County of Yolo, against The Regents of the University of California et. al., to compel his admission to the law school, to have the law school program declared unconstitutional or in violation of the federal enactments set forth above, and to recover damages for violation of his civil rights. (CT Vol. 1, p. 1, 130 DeRonde v. Regents of the University of California 28 Cal. 3d 875 at 879 (1981).

Petitioner was one of 2,238 applicants seeking enrollment to the school in 1975. Four hundred and six (406) applicants were extended offers of admission for

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[1]The Davis Law School was founded in 1968. The name of the law school is Martin Luther King, Jr. School of Law. In response to the legacy created by the namesake of Martin Luther King, Jr., Pierre Loiseaux, the Dean of the law school, stated in 1975;

> "This school has the largest minority enrollment outside of Howard University, and I would like to see that number increase." (At the time of making the statement of percentage of the preferred races at the school had risen from a low of 13.1% for the years 1969-1970 to a dramatic 41.6% for the academic year 1972-1973. (Petitioner's trial Exhibit No. 11, Deposition of Professor Charles Davenport at p. 53, See Dissenting Opinion of J. Mosk, as modified, 28 Cal. App. 3d 875 at 899 (1981)).

that school year. Petitioner was not among them. Of the 406 students who were extended offers of admission, 135 minority applicants were accepted; 1,800 applicants, including Petitioner, were rejected. Petitioner's undergraduate grade point average (GPA) of 3.47 and Law School Admissions Test score (LSAT) of 575, produced a 2.70 predicted first year average (PFYA), for comparison with other individuals seeking admission. At the time that Petitioner applied for admission and since 1970, the University of California, Davis Law School,[2] employed an admissions program that on its face permitted consideration of "ethnic minority status" to "mitigate" a low PFYA. "Ethnic minority" status was strictly limited to Chicanos, Blacks, Asians, Native Americans, and Filipinos. (CT Vol. 1, P. 69, DeRonde (supra) at 879, 881.

Seventy-two (72) applicants of the preferred racial backgrouns were admitted with objective credentials lower than Petitioner's. (Petitioner's trial Exhibit

[2]All schools within the university system employed some form of racial preference in their admissions policies at the time that Petitioner sought admission. The races preferred varied from institution to institution. (See brief submitted by deans of public law schools in California supporting Petitioner for Writ of Certiorari. University of California Regents v. Bakke 438 US 265 (1978); also Murray, Special Admissions at Boalt Hall (1977) 28 J. Legal Ed. 358.)

No. 6. DeRonde (supra) dissenting opinion of J. Mosk at p. 900.)

Reviewing the admissions statistics at the school of law from and after the adoption of the minority preference program, Justice Mosk[3] of the California Supreme Court, noted in dissent that:

"...A clear discriminatory pattern emerges."

"In 1972, only 5% of white male applicants and 7% of white female applicants were admitted, compared with 33.6% of minority applicants. In 1973, the figures were 8% of white male applicants and 6% of the white female applicants, compared with 26% of minority applicants; in that year the mean LSAT was 565 for minority admittees, compared with 692 for white male admittees, and a 3.17 GPA for minorities compared with 3.43 for white males.

If more minority applicants, even though less qualified, could be admitted without impacting on others better qualified, we would remain unconcerned. But the disparate figures, year after year, have had a significant cumulative effect upon the student body demography. In 1969-1970, the minority percentage of the total law school population was 13.1%. By 1972-1973, the minority percentage rose to 41.6% of the entire student body. Again, I stress that the increase would be laudable if, absent consideration of race, the minority admittees had equal objective qualifications, but the figures demonstrate otherwise. Thus, while whites generally, and white male applicants particularly, scored consistently higher on the LSAT and GPA, their representation in the whole Davis student body decreased in a mere 3 years from 86.9% in 1969

[3]Joined by Justice Clark.

to 58.4% in 1972. This demonstrates that race was the most important factor in admissions decisions and, I submit, constitutes invidious discrimination based upon race against whites generally and white males in particular. The circumstantial evidence is overwhelming that this overt discrimination has been practiced deliberately bythe admissions committee acting for the administration of this tax-supported university." DeRonde (supra) Dissenting Opinion of J. Mosk, 28 Cal. 3d at page 898.

In the year that DeRonde applied for admission, the committee which passed upon applications to the law school was composed of four members of ethnic minority background who themselves were, or had been, active in organizations dedicated to increasing the number of admittees from their particular racial group and had been actively involved in recruitment of only those racial minorities.[4] As Justice Mosk noted, "Under

[4]There was no space on the law school application form for a particular applicant to divulge his racial identity. The admissions committee was able to learn the race of a particular applicant from that portion of the application that required the applicant to "state his reasons as to why he wished to become a lawyer". Upon review of an exemplar of these "statements" by the trial court, it became obvious that minority applicants "flagged themselves" to the admissions committee through their personal statement. Members of Third World student interest groups (including those on the admissions committee) were given university vehicles to recruit their brethren and lecture them as to what the admissions committee was looking for in their personal statement. The admissions applicant booklet from 1972 forward, also stated that, "a candidate should at least have a

the(se) circumstances, the committees' objectivity was suspect at the outset." DeRonde (supra) 28 Cal. 3d at 898; RT p. 21, 37; Petitioner's trial Exhibit No. 13 Deposition of Ronell Gordon p. 7, 8; (CT vol. 1, p. 96).

For the school year that DeRonde applied for admission (1975-1976), 1,117 white males applied to the school. One hundred and fifty six (156) or 14% were accepted. At the same time, 494 minorities applied; 142 or 29% were accepted. Nearly 48% of the entering class was comprised of minorities, in spite of the fact that minority members were not distinguished by criteria other than race. The mean LSAT score for minorities was 562, for white males 676 an average of 114 points higher. The mean GPA for minorities was 3.27, for white males 3.57, (See Trial Exhibit No. 6; Dissenting Opinion of J. Mosk, DeRonde (supra) at p. 899.)

3.3 grade point average and 600 LSAT score in order to receive serious consideration for admission." Sadly enough, this was true with reference to most white male admittees, but absolutely false with reference to minority applicants as noted by J. Mosk above. Minority applications were given to "third world" student interest groups by the Dean of Admissions, Ronell Gordon, for their recommendations (which were generally favorable). The success of the recruitment process could be seen in the school newspaper which published racial cartoons depicting the plight of the "poor old white man" (with appropriate caricatures), together with "thank you" letters to these "third world" groups from successful admittees. CT vol. 1, p. 96, 97, 98, 99, 121; RT p. 52, 99, 107, 108, 109, 141, 142, 123; Deposition of Donald Wollett, Professor of Law, p. 13, 26. RT p. 56.

With scarcely ever an exception, the minority applicants consistently comprised 33% or more of the bottom[5] of each class. The Respondent attempted to justify the racial preference program to assist less-qualified minority applicants on the following bases:

> "1) To overcome the evils of societal discrimination against minorities, 2) To increase opportunities in legal education for minorities, 3) To promote diversity and integration in the Davis Law School, 4) To increase representation of minorities in the legal profession, 5) To provide an example to younger minority persons, 6) To improve the quality of legal services to minority groups, and; 7) To compensate for the claim that test scores and grade records do not necessarily reflect the capabilities of minorities."

The trial court found:

> "On the evidence before it, the court finds that the use of 'ethnic minority status'

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[5]On an objective basis, comparing LSAT socres, GPA'S and PFYA'S for the entering class of 1973-1974, the admissions committee passed over qualified Caucasians with extremely high objective statistics in favor of minority applicants with grades and test scores ranging all the way down to a 1.8 GPA. During discovery, the university's own professors made the admission that the university was employing a program of "massive discrimination" and felt that the employment of an actual quota (or two-track) system would be more honest. Professor John Poulos, the author of the admissions guidelines, was overheard to have said that they should be worded to "fuzz things up enough" so that the university would not be applying unconstitutional standards. (Petitioner's trial Exhibits Nos. 2, 5, 6, 7, 7a, 9; RT 103; Deposition of Donald Wollett 32, 33; Deposition of Charles Davenport, Professor of Law, p. 11, 48.)

to mitigate against a lower PFYA does not serve any of the purposes above-claimed by the Defendant Regents of the University of California, save and except purposes number 2 and 4 above." (C.T. Vol. 2 p. 66)

In addressing the issue of number 2 above, and rejecting this stated objective as infirm, this court said in University of California Regents v. Bakke 438 U.S. 265 (1978),

> "Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like Respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.' Bakke (supra) at page 310."

The fourth purpose advanced by the University was rejected by this Court in Bakke as insufficient to surmount the "strict scrutiny test". The purpose of 'increasing minority physicians (akin to increasing the number of minority lawyers) to better serve minority communities was held invalid as not "likely to have any significant effect on the problem." Bakke (supra) at p. 311.

With reference to the University's third rationale, the trial court determined that the Respondent's consideration of "ethnic minority status", allegedly to

promote diversity, was untenable:

> "There is no showing that the admissions criteria of the law school are essential to provide reasonable representation to ethnic minority groups. Indeed it would appear that the affirmative action programs and recruiting activity of the law school has attracted sufficient numbers of objectively qualified minority applicants to the law school to provide such reasonable representation without special admissions programs." (CT Vol. 2, Page 170)

This conclusion was based on oral testimony at trial and the statistical evidence in Petitioner's trial exhibits (discussed above) which indicated that members of minority groups and women indeed comprised the majority of the student body at the U.C. Davis Law School.

The trial court held the program unconstitutional on its face and in its application in violation of both the Due Process[6] and Equal Protection clauses of the Fourteenth Amendment. (CT Vol. 1, P. 171, 172) That portion of the judgment was appealed by the Respondents to the Third District Court of Appeal. The Court of Appeal upheld the trial court's determination on

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[6]The California Supreme Court did not address the Due Process rationale of the trial court with reference to the composition of the admissions committee and the "subjective nature" of their decicions. (CT vol. 1, p. 172.)

independent state grounds finding the same unconstitutional and in violation of California Constitution Article 1 §7.[7] DeRonde v. Regents of the University of California 99 Cal. App. 3d 136 (1980).

The California Supreme Court granted a hearing[8] in the matter to determine the federal constitutional issues and to review the decision of the Third District Court of Appeal.

REASONS FOR GRANTING THE WRIT

As the California Supreme Court recognized in its opinion below, the issues involved herein are of substantial and continuing public interest. As this court recognized in its opinion in Bakke, the issue of preferential minority admissions has not only generated a considerable amount of scholarly controversy, but is a constitutional issue of grave importance. Opinion of J. Powell, University of California Regents v. Bakke (supra) at page 281. Unfortunately, the problem is

[7] Article 1, §7 "A person may not be...denied equal protection of the laws. A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."

[8] The opinion of the Third District Court of Appeal was decertified for publication in the official reports of the State of California automatically by the Supreme Court's order granting a hearing. California Rules of Court, Rule 976(d).

not limited to a "scholarly controversy", for these racial preference programs have resulted in the systematic exclusion of hundreds of thousands of applicants to our educational institutions who do not happen to be members of certain preferred races. The issues set forth herein have become especially acute with the overcrowded and highly competitive admissions procedures in this country's graduate schools. The scores of amici curiae in this case below, as well as the Bakke case, attest to the great national concern attached to the issues set forth herein.

Moreover, the issues that Petitioner raises herein have not been disposed of by this court in its decision in University of California Regents v. Bakke (supra). At the very least, a clarification of the Bakke opinion is necessary to instruct our state and federal courts as to the proper use of race in admissions decisions.[9]

[9] The varying conclusions reached by the California Courts of Appeal in this and other cases attempting to interpret and apply the Supreme Court opinion in Bakke substantiate the need for guidance. See Hiatt v. City of Berkeley et. al., 88 Cal. App. 3d 503 (1979); Minnick v. Cal. Dept. of Corrections 95 Cal. App. 3d 506 (1979) (pending before this Honorable Court); Price v. Civil Service Commission 26 Cal. 3d 257 (1980); See also Philosophical Perspectives on Affirmative Action (1979) Mich. L. Rev. 513;Kenneth W. Simons; Rites of Passage (1979) 46 U. Chi. L. Rev. 775; Van Alstyne.

As the Third District Court of Appeal for the State of California caustically noted in this same case;

> "The long-awaited opinion of the United States Supreme Court in the University of California Regents v. Bakke (1978) 438 US 265 [57 L. Ed. 2d 750], proved weak and inconclusive. Instead of collectively and forthrightly addressing the simple Fourteenth Amendment phrase 'nor shall any state...deny to any person... the equal protection of the law', the Supreme Court Justices intellectualized themselves into decisional obscurity...Nevertheless, by a numerical count of their various expressions, we conclude that a five to four majority disapproves ethnic minority 'quotas' but sanctions their substantial equivalent, the use of ethnicity as 'a factor but not the factor' in the admissions criteria." DeRonde v. The Regents of the University of California, et al 101 Cal. App. 3d 136 (1980) at p. 228.

As Justice Brennan noted in dissent in Defunis v. Odegaard 416 US 312 (1974),

> "Moreover, in endeavoring to dispose of this case as moot, the court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of 26 amicus curiae briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately to this court." Defunis (supra) at p. 350.

Unfortunately this Court's opinion Bakke did not mollify Justice Brennan's criticism. For that reason as well as the egregious nature of the rule of preference below, your Petitioner contends that it is essen-

tial that this Court hear and determine the issues involved in this case for the following reasons:

1. To amend or clarify its opinion in this case of University of California Regents v. Bakke;

2. To define and invalidate a program that is operated as a subterfuge for the functional equivalent of a quota system;

3. To correct errors in the opinion below permitting only select races to be "preferred" to promote diversity in the admissions process.

A. THE FEDERAL BAKKE OPINION UPHOLDING THE "COMPETITIVE CONSIDERATION OF RACE" TO BE UTILIZED IN ADMISSIONS DECISIONS IS HISTORICALLY AND FUNDAMENTALLY IN ERROR.

That portion of the Powell opinion in the Federal Bakke case which permits race to be utilized as a factor in the admissions process is regressive, fundamentally wrong, and contrary to this Court's own precedents. There is simply no more charitable manner to state it. The spectre of racial discrimination has loomed over the United States since its infancy. Racial and ethnic discrimination flourished until an enlightened people, weary of the enmity and blood-spilling caused by racial hatred and distinction,

adopted the Fourteenth Amendment. In its eloquent simplicity the amendment mandated equality before the law for all persons. (See Raoul Berger, Government by Judiciary-The Transformation of the Fourteenth Amendment (1977) Harvard Univ. Press; Nathan Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy 1975, 1978 Harper and Row.)

A catasrophic reversal of that hope and promise of equality occurred with the decision of the United States Supreme Court in Plessy v. Ferguson 163 US 537 (1896) which once again sanctioned the application of race in our legal system. Ostensibly the application was to be equal. The advantage of hindsight labels its continued toleration deplorable.

The impassioned dissent of Justice Harlan in Plessy v. Ferguson 163 US 537 (1896) went unheeded until the landmark case of Brown v. Board of Education 347 US 483 (1954). The decision in Brown was touted as a new age of enlightenment in an effort to end, once and for all, discrimination on the basis of race in the United States. As stated by Chief Justice Warren therein, "Where the state has undertaken to provide it [an education] it is a right which must be available to all

on equal terms." Brown (supra) at p.483.

The implementation of the remedial aspect of the Brown case sought solutions for "clearly determined constitutional violations." Swann v. Charlotte-Mecklenburg Board of Education 402 US 1 (1971); McDaniel v. Barresi 402 US 39 (1971); Green v. County School Board 391 US 430 (1969); University of California Regents v. Bakke (supra) at p.300 Critically, in all of the above remedial decisions, never was a student denied access to an equal education. Rather, the purpose and effect of those decisions was (consistent with the egalitarian concepts of Brown) to guarantee an equal education to all persons.

Nonetheless, in 1978 Justice Powell, writing for this court in Bakke stated,

> "The fourth goal asserted by Petitioner is the attainment of a diverse student body. This is clearly a constitutionally permissible goal for an institution of higher education."
>
> "...The state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."

With those simple words, the United States Supreme Court again gave the administrators of higher educa-

tion the ability to lower a new veil of racism over our educational institutions. The preeminence of Brown and its laudatory ideals are again overshadowed by a reign of racial spoils akin to those legitimized by the most discredited cases in American legal history: Plessy v. Ferguson (supra); Korematsu v. United States 323 US 214 (1944); Hirabayashi v. United States 320 US 81 (1943); See e.g. Rostow, The Japanese American Cases; A Disaster 1945 54 Yale L.J. 489.

Although diversity has always been an important factor in our educational process, race, and the racial discrimination that is inevitable from its use, has never and will never, have any legitimate place in our educational systems.

Significantly, Justice Powell cited no Supreme Court precedent whatsoever for his compromise position that the use of race to deny admission to some in preference to others is a legitimate factor for our university administrators to weigh. The fact that there are students with differing skin pigmentation in a classroom does not provide the nexus that Justice Powell seeks to achieve to encourage the "robust exchange of ideas" so important to our educational process. (See Dissenting

Opinion of J. Mosk DeRonde (supra) at p. 897.) Rather, the use of race in admissions decisions has paved the road for the perversion of Justice Powell's opinion into a device of "social engineering" on the part of university administrators to restructure society to comport with their own political views. (See Kenneth W. Simons Philosophical Perspectives on Affirmative Action (1979) 77 Mich. Law. Rev. 513; William E. Simon A Time for Truth 1979, Berkeley Pub. Corp.) Nowhere is that defilement more prevalent than in the facts of this case.

Prior to the opinion of Justice Powell in University of California Regents v. Bakke, all Supreme Court precedent championed the "colorblind" application of the Fourteenth Amendment that equal protection demands:

> "Laws that divide and index people to measure their civil rights by race are unconstitutional. Laws that encourage others to do so are similarly invalid. Laws attempting to advance either policy, even in disguise, will likewise be struck down whenever it is within the capacity of our conscientious courts to see beneath their cellophane wrappers." United States v. Kahriger 345 US 22 (1953).

In Anderson v. Martin 339 US 460 (1950), this court struck down a state statute requiring the race of a candidate to appear under his name on an official state ballot noting;

> "We see no relevance in the states' pointing out the race of a candidate as bearing upon his qualifications for office."

As Justice Harlan wrote almost 100 years ago in his vigorous dissent in Plessy v. Ferguson (supra);

> "The Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of civil rights common to all citizens." Plessy (supra) at p. 554.

Except for the discredited deviations previously noted, this Court has been consistent in its denial of race as a consideration for any stated purpose. The lesson of this Court's prior pronouncements is that never will purposeful racial discrimination be deemed to be "compelling" so as to deny to our citizens equal protection of the laws. Shelley v. Kraemer 334 US 1 at 22 (1948); Loving v. Virginia 338 US 1 at 11 (1967); Yick Wo v. Hopkins 118 US 356 (1886); Brown v. Board of Education (supra).

Our United States Supreme Court has recognized that equal protection of the laws is a term applicable to our country's "people" and not limited to any specific ethnic group. University of California Regents v. Bakke (supra); McDonald v. Santa Fe Trail Transportation Company 427 US 273 (1976).

The use of race as a factor in admissions decisions has led to increased racial enmity and a system of racial spoils where, (as recognized by this court), such classifications serve to exacerbate racial and ethnic antagonisms rather than alleviate them. United Jewish Organizations v. Carey 430 US at 173-174 (1977). (See Defunis v. Odegaard 416 US 312 (1974), Douglas, J., dissenting, at page 320.)

The dissenting opinion of Justice Mosk in the case of Price v. Sacramento County Civil Service Commission, Etc., et al., 26 Cal. 3d 257 (1980), bears examination in this respect. Commenting on the advent of Bakke, Justice Mosk stated:

> "Those who recall the numerus clausus of many prestigious American universities before and after the turn of the century have an uneasy feeling of deja vu. Now, however, the virus is spreading beyond the field of education into employment and public service. Those who propose to recast our nation into a representative society, in which ability is secondary to race and sex, are making progress. The progress is attributable to political and social pressures by aggressive exponents of the new racism, and to apathy by those who still adhere to the traditional American ethic of achievement on the basis of merit."[3]

[3] The aggressive proponents of the new racism are actually a small segment of the nations population. Only 11% of the people favor preferential treatment; even among nonwhites, only 30% favor preferences over selection on ability. (Lipset and Schneider, "The Bakke Case: How it Would be Decided at the Bar of Public Opinion 1978 1 Public Opinion 38.

"It was not many decades ago that racial and religious quotas-the numerus clausus - governed admissions to a great number of universities, particularly in their professional colleges. An enlightened attitude, prodded by aggressive activity by persons devoted to promotion of democracy, ultimately prevailed: Educational institutions became convinced that quotas are essentially undemocratic and unjust. Now the trend...is being reversed under new demands created by a combination of guilt feelings for the sins of ancestors and overzealousness by those who insist upon reconstructing a merit society into a representative society."

This High Court's opinion (J. Powell) in Bakke not only authorized the employment of racial preferences but elevated such discrimination to a sacrosanct position by noting that;

"... a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases." Bakke (supra) pages 318-319.

In protecting individuals against governmental action, Justice Powell has the proverbial cart before the horse. Bakke requires that reviewing courts presume good faith on the part of educational institutions under circumstances where we know that the burden of proof must shift to the institution to justify its use of a racial classification as "compelling".

Since the advent of Bakke in striking down quota admissions programs, a university administrator would be in dereliction of the law to operate a stated quota program; hence, all continuing programs would have to be of the nonquota type, which this case will show was more pernicious than the Bakke 16% set aside.

From a pragmatic point of view, this portion of the Powell opinion in Bakke is indefensible. The courts of our nation cannot abrogate their responsibilities to preserve (for all our people) equal protection of the laws when, in spite of theapplication of the doctrine of strict scrutiny, they must presume the good faith of university administrators in denying or granting admission on the basis of race. Bakke has created a "good faith" exception to "strict scrutiny" which swallows the rule. History tells us that where racial classifications are involved the opportunity and likelihood of racial discrimination is high. It is for that very reason that Brown v. Board of Education (supra) eliminated the "separate but equal" doctrine of Plessy. The frailties of human nature are too susceptible to the malignant magnetism of racial prejudice to warrant a good faith presumption under any circumstances where

racial classifications are employed. Neither are our highly-educated university administrators immune from bias and racial prejudice as evidenced by the tragic history of racial discrimination in many of our oldest and most revered universities and colleges.

As in this case, those university administrators have simply changed their racial preference. It is nevertheless racial discrimination once again. Sadly, the discrimination has been sanctioned by the California Supreme Court. Tragically, the authority for the discrimination is this Court's own opinion in Bakke.

The majority opinion of the California Supreme Court justified the university's racial preference program on two bases:

1. That the university had a legitimate interest in encouraging diversity within the law school; and;

2. That the use of race is a legitimate factor to alleviate the effects of past racial discrimination. DeRonde 28 Cal. 3d at 886, 887. The majority rested both of these conclusions upon the decision of this court in Bakke. However, as Justice Powell himself noted in Bakke;

"The white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of white anglo-saxon Protestants. There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not." Bakke (supra) at p. 295.

However, in the decision below, that is exactly what the Supreme Court of the State of California has done in reliance upon the directives of Justice Powell in Bakke. Let's take the majority opinion to its logical conclusion. Assume, for purposes of argument, that the political tide in this country were to change, and the current white-Caucasian population, which is now required to pay the price for the effects of alleged past discrimination (who are themselves now victims of racial discrimination) pose a powerful united block to pusillanimous university administrators. Might a university legitimately argue that this new racial group is entitled to a "plus" in their files to atone for the effects of past discrimination against their numbers? Based upon the majority opinion of the California Supreme Court in DeRonde, this decision would be upheld as ameliorative of the effects of past discrimination. How then does

this differ from the Jim Crow Laws adopted by south-eastern states in the post-civil war period? Isn't the only difference between the legitimacy of this hypothetical and the Jim Crow Laws, the fact that we are now discriminating against white persons?

The Bakke decision has created an avenue conducive to a new system of "racial spoils" never countenanced in this country for decades. This discrimination is justified by proponents of the "new racism[10]" as a temporary measure to balance the relative success of ethnic minority groups in our country. How likely will the beneficiaries of this discrimination be to throw off the benefits of their preference when racial parity is reached? Who will make the decision as to when, if ever, their political goals are attained? In the words of Justice Paras, writing for the Third District Court of Appeal below (DeRonde, supra);

> "Anyone naive enough to believe that the day will arrive when the 'chosen people' of today's minority preference programs will voluntarily announce their achievement of proportionality and renounce all further preferential rights ignores both human nature and history. That will never be." (DeRonde (supra) at p. 233.

[10] See dissenting opinion of J. Mosk, Price v. Sacramento County Civil Service Commission Etc., et al., (supra)at p. 288.

The concept of "diversity" itself has simply become a facade for racial discrimination for a select few and, therefore, against the majority. Professor Alan Dershowitz of Harvard examined the diversity rationale as follows;

> "The incredible staying power of the 'diversity-discretion' model is due as much to the model's marvelous ability to mask genuine institutional criteria, which cannot or will not be publicly articulated, as it is to any deep-seated belief in the value of diversity as an educational desideratum....The raison d'etre for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals... The 'diversity-discretion' model thus subverts the ideals of responsibility and candor that are the hallmarks of any institution of learning in an open and democratic society." (Dershowitz and Hanft, Affirmative Action in the Harvard College Diversity-Discretion Model: Paradigm or Pretext? (1979) 1 Cardozo L. Rev. 379, 404, 407.

As Justice Mosk pointed out in dissent below,

> "...Even if diversity were a significant factor in enhancing the educational process-which, is dubious-it would not follow that race adds to that diversity. An applicant's potential ability to contribute to the diversity of the student body is uniquely a function of his or her individual experiences, interests, approaches, talents, and characteristics. The prep school black brought up in a middle class neighborhood by professional parents might contribute far less diversity than a Hasidic Jew from Brooklin, a Portuguese fisher-

man from Newbedford, a coalminer from Kentucky, or a recent émigré from the Soviet Union." DeRonde (supra) at 897.

To paraphrase Justice Mosk, to give members of a minority race a preference in admissions is simply to reward them for the accident of their race, a fact that has no relevance to the purported goals of education or service in a profession.[11] To reward some persons for the accident of their races is inevitably to punish others for the accident of theirs. The Fourteenth Amendment should not tolerate any application of race in admissions decisions.

B. ASSUMING THE VALIDITY OF RACE AS A FACTOR IN THE ADMISSIONS PROCESS, THE DAVIS PROGRAM IS NONETHELESS INVALID ON ITS FACE FOR ITS FAILURE TO ALLOW FOR THE COMPETITIVE CONSIDERATION OF ALL RACES IN THE ADMISSIONS PROCESS.

It is conceded that only five (5) select ethnic minorities were allowed to be considered to allegedly confer some sort of "diversity" upon the entire student population at the Martin Luther King, Jr. School of Law. A "plus point" was given only to those certain defined

[11] As Mr. Justice Frankfurter once said "in law, what mattered was excellence in your profession, to which your father or your face was equally irrelevant. The Quality of Intellectual Competition (1973) 25 J. Leg. Ed. 378, 383. See also Dissent of J. Douglas, Defunis v. Odegaard (supra) at p. 320.

races. The race of no other applicant was allowed to be considered for purposes of diversity. Nonetheless, the racial preference scheme was upheld by the California Supreme Court.

As a result of the California Supreme Court's decision, the University of California has been given a free hand to pick and choose what races it will allow "plus points" to. This new rule of constitutional law has no support in the Powell "swing" opinion in Bakke, upon which the court below based its opinion.

Justice Powell in Bakke only noted that;

> "The state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." Bakke (supra) at p. 320.

Justice Powell did not say the competitive consideration of ethnic minority races! Justice Powell went on to say in the Bakke opinion that;

> "Diversity...includes a variety of factors, such as geographic origin, unusual life experiences, special talent and educational qualifications, as well as disadvantaged, economic, racial or ethnic background." Bakke (supra) at p. 265.

Again, Justice Powell did not say disadvantaged, economic, ethnic minority background! Justice Powell did not define what he meant by race, nor racial back-

ground in Bakke. However, it is ludicrous to argue that all of those "graced" ethnic minority students at Davis who were admitted to the school of law due to the fortuities of their birth were disadvantaged economically or racially. Justice Powell did not define "race" in Bakke so narrowly as to incorporate within that term, only certain select ethnic groups that any university may seek to prefer. The California Supreme Court has thus gone beyond any legitimate rationale in Bakke to give "carte blanche" authority to the University of California to pick and choose which races they will prefer at any point in time. Due to the fact that there is very little, if any, justifiable rationale for the preference of the five sacrosanct races that now curry favor, the yardstick used by administrators to measure constitutional parameters will now be their independent whim, coupled with the consideration of who, among ethnic minority groups, screams the loudest.

In this respect, this Court in Bakke quoted approvingly from Mr. Justice Douglas' opinion in Defunis v. Odegaard,

"The reservation of a portion of the law

school class for members of selected minority groups is frought with...dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [Cf. Plessy v. Ferguson 163 US 537, 549, 542, 42 L. Ed. 2d 256, 16 S. Ct. 1138 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to Blacks, or to Blacks and Chicanos. Once the court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled Sweatt v. Painter 339 US 629, 94 L. Ed. 1114, 70 S. Ct. 848, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard, the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, e.g. Yick Wo v. Hopkins 118 US 356, 30 L. Ed. 220, 6 S. Ct. 1064; Terrace v. Thompson 263 US 197, 68 L. Ed. 255, 44 S. Ct. 15; Oyama v. California 332 US 633, 92 L. Ed. 249, 68 S. Ct. 269. This Court has not sustained a racial classification since

the wartime cases of Korematsu v. United States, 323 US 214, 98 L. Ed. 194, 65 S. Ct. 193, and Hirabyaski v. United States, 320 US 81, 87 L. Ed. 1774, 63 S. Ct. 1375, involving curfews and relocations imposed upon Japanese-Americans."

"Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles, and Italians, Puerto Ricans, and Hungarians, and all other groups which form this diverse nation would have just complaints.'" Defunis v. Odegaard, 416 US 312, 337-340, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974) (Dissenting Opinion)(Footnotes omitted). Bakke (supra) p.298 Ft.Nt. 37.

This High Court, agreeing with Mr. Justice Douglas in Bakke, refused to have the Court participate in an evaluation of the extent of the prejudice (and consequent harm), suffered by various minority groups to validate a racial classification preferring select groups. Bakke (supra) at p. 296, 297.

However, in the words of Justice Douglas, the California Supreme Court, in sanctioning racial preferences such as those before this court, has effectively "wash(ed) its hands of the matter, leaving it entirely in the discretion of the school" which races they will choose to prefer. This carte blanche authority given to the University of California has effectively overruled Sweatt v. Painter (supra). To paraphrase Justice Powell's opinion in Bakke, the California Supreme Court has turned

back the clock of our liberties to 1868. Bakke (supra) at p. 295.

The Powell opinion in Bakke submitted for examination the "Harvard Program" of admissions as an example of a competitive consideration of race passing constitutional muster. Critically, the Harvard program, unlike the Davis program, did not specify preferred races. Bakke (supra) Appendix to Opinion of J. Powell p. 321. DeRonde (supra) Dissenting Opinion of J. Mosk at p. 898 ftnt. 2. Never has the United States Supreme Court determined that university officials are given the authority to consider only those select races which they feel will contribute to "diversity". To allow them to do so would be a direct contradiction to the diversity concept itself. That fact is evident from the admissions statistics at the Davis School of Law, where four straight years of discrimination in favor of the select races led to a student body swelling with members of the preferred races far in excess of their proportionate number in the State of California. (See Petitioner's Exhibits 5, 6, 7, 7a, 8, and 9.) It is these statistics which lead us to the final challenge to the Davis program.

C. THE ADMISSIONS PROGRAM AT THE UNIVERSITY OF CALIFORNIA AT DAVIS IS DISCRIMINATORY "AS APPLIED".

In his majority opinion below, Justice Richardson concluded that;

> "Nonetheless, in our view, the record before us does amply establish 'past discrimination' within the contemplation of the Brennan opinion (in Bakke) and standards." DeRonde (supra) at p. 885.

As this court will see upon review of the record below, Justice Richardson was absolutely correct inasmuch as there was overwhelming evidence of past discrimination. Unfortunately for the Richardson premise, that past discrimination was against Caucasians, not minorities. It was not Justice Richardson who reviewed the record in his opinion, rather, it was Justice Mosk. Justice Mosk wryly commented upon the Richardson conclusion;

> "In attempting to meet its burden of proving a compelling state interest, the Davis administration initially denies it gives preferential treatment on the basis of race; it contends that ethnicity is only one factor considered in admissions. Obviously no one takes that sophistry seriously, least of all my colleagues." DeRonde (supra) at page 895.

Dealing with Justice Richardson's premise, Justice Mosk emphatically noted that there was no evidence of past discrimination against minorities at the univer-

sity's law school. Rather, through an extensive review of the statistics set forth in the Statement of Facts of this Brief, Justice Mosk reached the only logical conslusion "...that race was the most important factor in admissions decisions and (as such), constitute(d) invidious discrimination, based on race, against white males."* DeRonde (supra) at page 899.

> "The circumstantial evidence is overwhelming that this overt discrimination has been practiced deliberately by the admissions committee acting for the administration of this tax-supported university." DeRonde (supra) at page 899.

CONCLUSION

Petitioner is at a loss to state it more eloquently than Justice Mosk in his dissent herein;

> "In the final two decades of the 20th century, it is incongruous for racism in any guise to creep by stealth into American academia, and to be not only abjectly accepted, but now stoutly defended. If the principles of democracy and constitutional equal protection are not recognized in the intellectual environment of taxpayer-supported institutions of higher learning, perhaps one should not be so incredulous when some judges are willing blindly to acquiesce in public benefits being bestowed or withheld in whole or in part on the basis of race.
>
> One of the tragedies of history is that courts of law have placed their stamp of approval

*Our emphasis

on racism. In People v. Hall (1854) 4 Cal. 399, our predecessors on this court upheld a statute that prohibited 'black, yellow, and all other colors' of persons, whom 'nature has marked as inferior', from testifying against whites.

But the cases that will endure, and will pass the test of time, are not those that emphasize race as a benefit or detriment, but those that totally exclude race as a consideration in determining rights. One may ask, rhetorically, which opinion will enjoy the plaudits of posterity, Brown v. Board of Education - which took racial factors out of public schools - or the majority opinion in Plessy v. Ferguson - which permitted separation on a basis of race? It seems equally inevitable that the prospective of time will relegate Price,[12] which approved a mathematical racial quota in public employment, to the same historical ashheap that contains such cases emphasizing race as People v. Hall, supra, Fong Yue Ting v. United States (1893) 149 US 698, and Quock Ting v. United States (1891) 140 US 417." DeRonde (supra) at pages 905, 906.

Your Petitioner respectfully requests that this honorable Court accept the "rare opportunity to offer a ringing declaration in support of racial equality"[13] and relegate to that ashheap of American jurisprudence, the case of DeRonde v. The Regents of the University of California 28 Cal. 3d 875 (1981).

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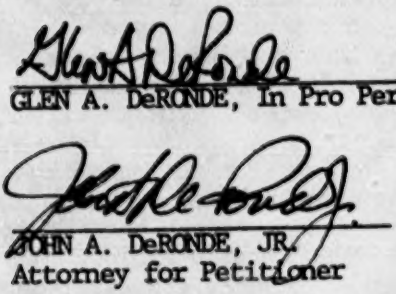
[12] Price v. Sacramento Civil Service Commission 26 Cal. 3d 257 (1980).

[13] Dissent of J. Mosk, Price v. Sacramento County Civil Service Commission (supra).

DATED: May 13, 1981

Respectfully submitted,



GLEN A. DeRONDE, In Pro Per

JOHN A. DeRONDE, JR.
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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S.F. 24145

GLEN DeRONDE,
Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,
Defendants and Appellants.

(Filed February 11, 1980)

Were the admissions procedures permitting consideration of "ethnic minority status" as a factor in the 1975 selection of the first year class at King Hall, the University of California at Davis School of Law, violative of the equal protection guarantees afforded non-minorities under the federal or state Constitutions? We conclude that they were not.

Plaintiff Glen DeRonde, a white male, was 1 of 2,238 applicants seeking enrollment in King Hall in 1975. On the basis of criteria hereinafter described, 406 applicants were extended offers of admission. In July 1975, DeRonde, an unsuccessful applicant, sought mandamus in the Yolo County Superior Court against the

Regents of the University of California and the Dean of King Hall (collectively described herein as the University), to compel his admission to King Hall and to recover damages for his exclusion. He attacked the University's selection procedures alleging that they were unconstitutional because of the preferences extended to minority applicants.

In February 1976 the trial court filed its notice of an intended decision holding that because DeRonde would have been unsuccessful even had the challenged procedures not been used, DeRonde was not entitled to the relief requested. Nonetheless, the court examined the merits of DeRonde's constitutional challenge, and concluded that because the University's admissions procedures were facially discriminatory they violated the equal protection clauses of both the state and federal Constitutions. The court therefore enjoined the University from utilizing any admission criteria based on an applicant's race, color or ethnic origin.

Following the announcement of the intended decision, several interested persons and organizations filed motions to intervene. These motions were denied and a judgment was entered in December 1976. (Although the

denial of intervention was affirmed in a separate appeal, various unsuccessful interveners have appeared herein as amici curiae.) The University filed a notice of appeal, and DeRonde has cross-appealed.

(1) In the interim DeRonde has graduated from another law school and has been admitted to the State Bar. Although he no longer seeks entry to King Hall, we have chosen not to dismiss the case as moot. The trial court judgment, enjoining the University, as it does, from its continued use of certain of its admissions criteria, has cast a substantial cloud of uncertainty over the University's multiple and widely used procedures. The parties and amici before us have thoroughly briefed the constitutional issues and have urged us to resolve them. We have the benefit of additional instructive and controlling federal authority. There is ample precedent for appellate resolution of important issues of substantial and continuing public interest which otherwise may have been rendered moot and of no further immediate concern to the initiating parties. (E.g., Johnson v. Hamilton (1976) 15 Cal. 3d 461, 465 [125 Cal. Rptr. 129, 541 P. 2d 881], and cases therein cited.) We conclude that this is such a case

and that the validity of "race conscious" or "race attentive" admissions programs is an important question of continuing statewide interest. Accordingly, we will resolve the issue.

After first examining the law school's admissions procedures we apply both the constitutional principles and analyses contained in appropriate federal and state authorities.

I. THE UNIVERSITY'S 1975 ADMISSIONS PROCEDURES

The record discloses that in selecting candidates for admission to King Hall in 1975 the University relied principally on a formula which combined an applicant's previous academic grade point average (GPA) with his or her score on the standardized law school admissions test (LSAT). This formula yielded a predicted first year average (PFYA) which, it was hoped, measured, at least roughly, the applicant's potential for law study.

Believing, however, that the foregoing formula tended to ignore other significant and relevant selection factors, the University considered several additional background elements to supplement or mitigate a lower PFYA. These factors included (growth, maturity

and commitment to law study (as shown by prior employment, extracurricular and community activites, advanced degrees or studies, and personal statements and recommendations), (2) factors which, while no longer present, had affected previous academic grades (such as temporary physical handicaps or disruptive changes in school or environment), (3) wide discrepancies between grades and test scores where there was indicated evidence of substantial ability and motivation, (4) rigor of undergraduate studies, (5) economic disadvantage, and (6) "ethnic minority status" contributing to diversity.

It is the consideration by the University of the final factor, "ethnic minority status," which is the principal target of DeRonde's attack. Trial testimony established that "ethnic minority status" was defined by the University as including Asians, blacks, Chicanos, native Americans and Filipinos. This grouping generally corresponds to the ethnic categories defined by the federal Equal Employment Opportunity Commission in its public reports. The record reflects that the University's reasons for considering minority status were primarily twofold: First, an appreciable minority representation in the student body will contribute a valuable

cultural diversity for both faculty and students and, second, a minority representation in the legal pool from which future professional and community leaders, public and private, are drawn will strengthen and preserve minority participation in the democratic process at all levels. In short, it was believed that the individual and group learning experience is enriched with broadly beneficial consequences both to the profession and to the public at large. We carefully emphasize that although minority status was included as one of several pertinent selection factors, the University did not employ any quota system or reserve a fixed number of positions for any minority applicants in its entering class.

Just as a relatively low PFYA might be increased by utilization of any of the foregoing factors, alternatively, a relatively high PFYA could be reduced by considering (1) the applicant's prior schools attended, (2) the difficulty of his or her prior course of study, (3) variations in an applicant's multiple LSAT scores, (4) the absence of any factors indicating maturity or motivation, and (5) the applicant's advanced age.

As a consequence of this formulation, in 1975, the

406 students to whom the University offered admission included 135 minority applicants, and more than 1,800 applicants including DeRonde were rejected. DeRonde's 3.47 GPA and 575 LSAT score produced a 2.70 PFYA. The PFYAs of successful applicants ranged from 2.24 to 3.43. Sixty-nine minority applicants were accepted with PFYAs lower than DeRonde's. On the other hand, the more than 800 unsuccessful applicants who had higher PFYAs than DeRonde included 35 minority applicants. It was on the basis of these latter statistics that the lower court found that DeRonde would have been rejected for admission even if the University had not employed an admissions procedure which gave consideration to "ethnic minority status".

We examine the constitutional issues.

II. FEDERAL CONSTITUTION

(2) Our analysis of the federal constitutional questions is both aided and controlled by the decision of the United States Supreme Court in University of California Regents v. Bakke (1978) 438 U.S. 265 [57 L.Ed.2d 750, 98 S.Ct. 2733]. In that case, Bakke, a disappointed white male applicant for admission to the School of Medicine at the University of California at Davis, challenged on equal protection grounds an

admissions policy which reserved to disadvantaged minority (Asian, American Indian, Black, and Chicano) students 16 of the 100 available seats. Although a majority of the high court invalidated this fixed quota system, multiple opinions were filed.

Four justices (Stevens, J., joined by Burger, C.J. Stewart and Rehnquist, JJ.) found it unnecessary to reach the constitutional issue, concluding as they did that the Davis quota system violated the general antidiscrimination provisions of title VI of the federal Civil Rights Act. (See 438 U.S. at pp. 408, 421 [57 L.Ed.2d. at pp. 845, 853]). Four other justices (Brennan, White, Marshall, and Blackmun, JJ., writing a joint opinion hereafter referred to as the Brennan opinion) were of the view that the quota system (as well as other race conscious admissions systems) was proper under both the Civil Rights Act and the federal Constitution, as a means of overcoming the effects of past discrimination. (See id., at pp. 324, 363, 369 [57 L.Ed.2d at pp. 792, 816, 821].)

Justice Powell, writing separately and joined by no other justice, concurred in striking down the Davis quota system, thereby affording majority support for its

invalidity. In stating his view that the Davis quota system was unconstitutional under the federal equal protection clause, he characterized the Davis procedure as one employing "an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class." (P. 319 [57 L.Ed.2d. at p. 789].)

A majority of the justices voted to overturn the challenged system. Of even greater importance to the resolution of the present case, however, a separate but clear majority of the high court (namely, Powell, Brennan, White, Marshall, and Blackmun, JJ.) indicated approval of race conscious admissions programs similar to the University's procedure under scrutiny here. (See pp. 316-319 [57 L.Ed.2d at pp. 787-789][opn. of Powell, J.]; 324-326, and fn. 1 [57 L.Ed.2d at pp. 792-793][opn. of Brennan, J.].) Because two separate lines of high court reasoning converged to reach this conclusion, we review each opinion separately.

In passing, we note that a comparable analytical approach was used by the Washington Supreme Court in McDonald v. Hogness (1979) 92 Wn.2d 431 [598 P.2d 707,

712-715], certiorari denied ___ U.S. ___ [___L.Ed.2d ___, ___S.Ct.___], in upholding a race-sensitive medical school admissions program closely akin to the University's procedures herein challenged. Bakke itself has drawn much academic interest and attention, expressed in many useful law review articles, several of which adopt a comparable analysis of the various Bakke opinions. (See, e.g., A Symposium: Regents of the University of California v. Bakke (1979) 67 Cal.L.Rev. 1 et seq.; Karst & Horowitz, The Bakke Opinions and Equal Protection Doctrine (1970) 14 Harv.Civ.Rights-Civ. Lib. L.Rev. 7: Lesnick, What Does Bakke Require of Law Schools (1979) 128 U.Pa. L.Rev. 141; Stone, Equal Protection in Special Admissions Programs: Forward from Bakke (1979) 6 Hastings Const.L.Q. 719; Note, The Supreme Court, 1977 Term, Constitutional Law (1978) 92 Harv.L.Rev. 57, 131.)

a) The Powell Opinion Because Justice Powell represented the "swing" or pivotal vote in Bakke, we focus first on his views. He concluded that although any race conscious classification must serve a compelling governmental interest (see pp. 299, 305 [57 L.Ed.2d at pp. 776-777, 780-781]), nevertheless "the State has a substantial interest that legitimately may be served

by a properly devised admissions program involving the competitive consideration of race and ethnic origin" (p. 320 [57 L.Ed.2d. at p. 790]). He expressly cited with approval the admissions procedures used at Harvard College, whereby diversity among its students is sought without using racial quotas or otherwise precluding qualified applicants from competing for all available seats in the entering class. "Diversity" under the Harvard program includes a variety of factors, such as geographic origin, unusual life experience, special talent and educational qualifications, as well as disadvantaged economic, racial or ethnic background.

We find significance in Justice Powell's description and evaluation of the Harvard program: "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities

more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enought to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class.

"This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may

have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." (Pp. 317-318 [57 L.Ed.2d at pp. 788-789].)

In our view the admissions procedures used by the University to select its 1975 entering class at King Hall does not vary in any significant way from the Harvard program. Minority racial or ethnic origin was one of several competing factors used by the University to reach its ultimate decision whether or not to admit a particular applicant. Each application, as contemplated by the program, was individually examined and evaluated in the light of the various positive and negative admission factors. As Justice Powell pointedly observed, the primary and obvious defect in the quota system in Bakke was that it precluded individualized consideration of every applicant without regard to race. (Pp. 317-318, and fn. 52 [57 L.Ed.2d at pp. 788-789].) That fatal flaw does not appear in the admissions procedure before us. This is not a quota case. Thus, we conclude that the race attentive admissions procedure

used by the University in 1975 would have passed federal constitutional muster under the standards prescribed by Justice Powell in Bakke.

b) The Brennan Opinion. The Brennan opinion, representing the views of four justices, would have upheld the Davis quota system invalidated by the majority in Bakke. It may fairly be concluded that a race conscious law school admissions program that did not involve a quota, a fortiori, would be sustained by those holding the Brennan view. Justice Brennan also expressed approval of the Harvard admissions program, albeit on a different ground than the diversity benefit emphasized by Justice Powell. Justice Brennan "agree[d] with Mr. Justice Powell that a plan like the 'Harvard' plan...is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." (P. 326, fn. 1 [57 L.Ed.2d at p. 793]; see also pp. 378-379 [57 L.Ed.2d at pp. 826-827] [expressing the view that the Harvard plan is "no more or less constitutionally acceptable" than the Davis quota system ruled invalid by the majority].) Justice Brennan expands the foregoing requirement of a past discriminatory effect

and would hold that even a racial quota system such as involved in Bakke was constitutional if its purpose "is to remove the disparate racial impact [the University's] actions might otherwise have and if there is no reason to believe that the disparate impact is itself the product of past discrimination whether its own or that of society at large." (P. 369 [57 L.Ed.2d. at pp. 820-821].)

Because the trial of the present case preceded the filing of federal Bakke, the parties, of course, neither framed nor litigated the issue - whether the University's admissions program was "necessitated by the lingering effects of past discrimination." Nevertheless, in our view, the record before us does amply establish "past discrimination" within the contemplation of the Brennan opinion and standards.

First, the evidence supports a finding that the use of a race conscious admissions program was needed to prevent a disproportionate underrepresentation of minorities in King Hall. The testimony of Professor Barrett, former dean of the law school, stressed that if admission selection was based solely upon "numbers" (i.e., GPA and LSAT scores), "the greatest bulk of the minority appli-

cants" would be excluded. No contrary testimony was introduced at trial.

Second, past societal discrimination against ethnic minorities is an unfortunate, but demonstrable, historical fact acknowledged in both the Powell (p. 296, fn. 36 [57 L.Ed.2d at p. 816]) and Brennan (pp. 369-373 [57 L.Ed.2d at pp. 820-823]) opinions in Bakke, as well as by a majority of this court in Price v. Civil Service Com. (1980) 26 Cal.3d 257, 386 [161 Cal. Rptr. 475, 604 P.2d 1365] (referring to "the pervasive discrimination long endured by minorites in our society").

Finally, the existence of a nexus between past discrimination and present disproportionate academic and professional underrepresentation was fully acknowledged in the Brennan opinion itself, wherein it was readily assumed that societal discrimination against minorities has impaired their access to equal educational opportunity. As the opinion states, "Davis clearly could conclude that the serious and persistent underrepresentation of minorities in medicine...is the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education and in society generally,

as well as in the medical profession. [Pp. 370-371 (57 L.Ed.2d at pp. 821-822).]...[§] Judicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minority applicants;...[T]he conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of de jure segregation, the resistance to Brown I [Brown v. Board of Education (1954) 347 U.S. 483 (98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R.2d 1180)], or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination [citation], and yet come to the starting line with an education equal to whites." (P. 372, [57 L.Ed.2d, pp. 822-823], italics added, fns. omitted.)

Although the foregoing observations were expressed within the context of a discussion of minority admissions to medical school, it seems fair to conclude that the justices joining in the Brennan opinion would reach an identical conclusion with respect to the effect of past societal discrimination upon minority applicants to King Hall. While Justice Powell regarded as too speculative the provability of any connection between

past discrimination and minority failures to gain admission (see p. 296, fn. 36 [57 L.Ed.2d, p. 775]), no such misgivings are expressed in the Brennan opinion.

Accordingly, we conclude that, whether based on the Powell reasoning of assuring an academically beneficial diversity among the student body, or on the Brennan rationale of mitigating the effects of historical discrimination, it is abundantly clear that the University's 1975 admissions program would, on its face, meet federal constitutional standards as declared by a majority of the justices of the high court.

(3) We readily acknowledge, of course, that a facially valid procedure may in its actual application produce a constitutionally discriminatory result. Indeed, Justice Powell in Bakke fully and fairly both raised the possibility and anticipated the answer, noting: "It had been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated - but no less effective - means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is

simply one element - to be weighed fairly against other elements - in the selection process...And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. [Citations.]" (Pp. 318-319 [57 L.Ed.2d, p. 789], italics added; but see pp. 378-379 [57 L.Ed.2d, pp. 826-827][opn. of Brennan, J.].) Again, we emphasize Justice Powell's analysis on the point because the Brennan group presumably would permit even a deliberate and systematic exclusion of white applicants if supported by the requisite showing of past discrimination.

Justice Powell further observed that "So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of

proving legitimate educational purpose." (Id., at p. 319, fn. 53 [57 L.Ed.2d at p. 789].)

The record before us is barren of any evidence showing that the University was deliberately using the challenged admissions procedure either as a "cover" for a quota system or as a means of systematic exclusion of, or discrimination against, white male applicants such as DeRonde. The trial court made no such finding. Without proof of such an intent, the University's procedures must be upheld against a claim of unlawful racial discrimination even if accompanied by some evidence of a disproportionate impact. (See Bakke, p. 289, fn. 27 [57 L.Ed.2d, p. 770] [opn. of Powell, J.]; Arlington Heights v. Metropolitan Housing Corp. (1977) 429 U.S. 252, 264-266 [50 L.Ed.2d 450, 463-465, 97 S.Ct. 555].)

Moreover, the evidence fails to support a finding of such disproportionate impact. The record does reflect that, between 1971 and 1977, the percentage of minorities in the entering classes at King Hall has been substantial, fluctuating from a low of 22.78 percent in 1971 to a high of 41.6 percent in 1976. From this arithmetic, DeRonde argues that "for six straight years from 1971 to 1976, the percentage of minority students entering

classes at Davis Law School averaged 33% of those classes. This was at a time when more highly qualified male Caucasians were applying for admission than in the history of the school....[¶] How can there be said to exist no 'disproportionate' impact when extremely well-qualified male Caucasian applicants outnumber poorly-qualified minority applicants by over three to one and are admitted to the school in a lesser percentage?" (Italics added.)

As the italicized portion of the argument reveals, the principal difficulty with DeRonde's statistical analysis is that it is based upon the faulty premise that it is only a high PFYA or GPA which truly "qualifies" an applicant for admission to law school. Yet as Justice Powell carefully explained in Bakke, racial or ethnic origin, as well as other "nonobjective" factors, such as personal talents, work experience or leadership potential, properly may be considered in weighing each applicant's qualifications. (438 U.S. at pp. 317-320 [57 L.Ed.2d at pp. 788-790]; for a probing analysis of the concept of "merit" within the academic context, see Fallon, To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law

of Antidiscrimination (1980) 60 B.U. L.Rev. 815, 871-876.)

DeRonde's statistics may indicate that the University has placed considerable weight upon racial or ethnic factors in determining the composition of its entering law classes. Yet nothing in Bakke prohibits such a practice, so long as individualized personal consideration is given to the varied qualifications of each applicant. Furthermore, the fact remains that male Caucasian applicants to King Hall continue to gain admission in respectable numbers. For example, according to DeRonde's own figures, in 1975, the year of DeRonde's application, 157 white males were offered admission as opposed to 133 minority applicants. We do no not know the number of white females who were admitted. These statistics alone, however, would appear to contradict any assertion that the University has adopted or implemented a systematic plan or scheme to exclude male Caucasians.

We conclude that the University's 1975 admissions procedures did not violate the equal protection clause of the federal Constitution, as authoritatively interpreted by a majority of the United States Supreme Court

in its Bakke decision. We turn then to DeRonde's contention that these procedures violated similar provisions of the California Constitution.

III. CALIFORNIA CONSTITUTION

(4) DeRonde, relying primarily upon the reasoning of the majority in Bakke v. Regents of University of California (1976) 18 Cal.3d 34 [132 Cal.Rptr. 680, 553 P.2d 1152], urges us to hold that the University's race conscious admissions program violated the equal protection guarantees of article I, section 7, of the state Constitution. DeRonde correctly observes that, on some prior occasions, a majority of our court has departed from applicable federal precedents in reliance upon state constitutional principles. (E.g., Serrano v. Priest (1976) 18 Cal.2d 728, 764 [135 Cal. Rptr. 345, 557 P. 2d 929]; People v. Brisendine (1975) 13 Cal.3d 528, 545 [119 Cal.Rptr. 315, 531 P.2d 1099].) As Serrano holds, the equal protection guarantees contained in article I, section 7, subdivision (a), of the California Constitution afford protections different from, and independent of, those extended by the Fourteenth Amendment. Yet in the specific context of minority advancement programs, we have stated our position quite recently and clearly, albeit by a divided court. In this area the court's

majority has explicitly concluded that the state Constitution imposes no greater restrictions than similar guarantees provided by the federal charter. (Price v. Civil Service Com., supra, 26 Cal.3d 257, 284-285.) The principles of Price are clearly controlling here.

In Price, we upheld an affirmative action hiring program ordered by a county civil service commission as a means of alleviating an underrepresentation of minority employees attributable to past discriminatory employment practices by the hiring entity. We first observed that the county's hiring program was consistent with federal constitutional guarantees as declared by the United States Supreme Court in Bakke and in Steelworkers v. Weber (1979) 443 U.S. 193 [61 L.Ed.2d 480, 99 S.Ct. 2721]. We then examined and rejected the argument that the program was barred under state equal protection principles, explaining: "Although the state equal protection guarantee embodied an article I, section 7, subdivision (a) of the California Constitution does provide safeguards separate and distinct from those afforded by the Fourteenth Amendment (see Cal. Const., art. I, §24; see, e.g., Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 469 [156 Cal.Rptr. 14, 595 P.2d 592]), the district attorney points to no authority which suggests

that the California equal protection clause should be interpreted to place greater restrictions on bona fide affirmative action programs than are imposed by the Fourteenth Amendment. To the contrary, our past decisions construing article I, section 7, subdivision (a) reflect this court's recognition of the importance of interpreting the provision in light of the realities of the continuing problems faced by minorities today. (See Crawford v. Board of Education (1976) 17 Cal.3d 280, 301-302 [130 Cal. Rptr. 724, 551 P.2d 28].) Viewed from this perspective, we conclude that the state equal protection clause erects no barrier to a municipality's adoption of the kind of affirmative action plan authorized by rule 7.10." (26 Cal.3d at pp. 284-285.)

Having held in Price, wherein an express quota was applied, that the state Constitution places no greater restrictions upon affirmative action programs encouraging increased minority representation than are imposed by the federal Constitution, a fortiori, under principles of stare decisis, we impose no state constitutional bar where the program involves no fixed quota but only consideration of race as one among several other qualifying factors. Although the University's admissions program

at issue here is presented within the context of educational opportunity rather than employment hiring, the Price analysis is equally applicable.

In conclusion, both for practical and policy reasons, we do not lightly disregard pertinent decisions of the United States Supreme Court resolving issues of nationwide interest and importance. Uniform standards in the critical area of educational opportunity appear desirable. The high court's Bakke decision, although based on differing rationales, gives clear guidance for our decision to the extent that it is controlled by the equal protection requirements of the United States Constitution. We ourselves, by majority vote very recently in Price, concluded that even utilization of a fixed quota did not offend the California Constitution.

We have a traditional and instinctive reluctance to intrude unnecessarily into the administrative affairs of the University of California and do so only under clear constitutional or statutory mandate. A university requires a measure of "elbow room" within which to perform its functions. In its wisdom the appropriate administration-faculty-student admissions committee in full cooperation with the regents has proceeded upon a path which it

believes will best achieve fairness and balance in the admission to the University's professional schools. It has done so for legally acceptable, educational purposes. The King Hall admissions program was conceived in good faith and, as demonstrated by the record before us, has thus far been implemented within constitutional boundaries.

The judgment is reversed to the extent that it (1) declares the University's admissions program is discriminatory and a violation of equal protection of the laws, (2) enjoins the University from any consideration of race, color or ethnic origin in the admissions process at King Hall, and (3) awards costs of suit to DeRonde. In all other respects, the judgment is affirmed.

Bird, C. J., Tobriner, J., and Rattigan, J.,* concurred.

MOSK, J. - I dissent.

The majority opinion, I regret to say, was preordained. Any court that would stray so far from basic principles of constitutional equal protection as to approve a rigid racial quota system in public employment (Price v. Civil Service Com. (1980) 26 Cal.3d 257 [161 Cal. Rptr. 475, 604 P.2d 1365]) can be expected to accept any program of race consciousness in public education. But repetition

*Assigned by the Chairperson of the Judicial Council.

does not disinfect, it exacerbates legal and social error.

The majority, armed in adamant, insist upon turning the calendar back several decades. They have chosen to revive the indefensible practices of pre-Brown days (Brown v. Board of Education (1954) 347 U.S. 483 [98 L. Ed. 873, 74 S.Ct. 686, 38 A.L.R.2d 1180]) when skin pigmentation and ethnicity were the qualifications that determined a child's school. They have rejected the plea of Justice Harlan in Plessy v. Ferguson (1896) 163 U.S. 537 [41 L.Ed. 256, 16 S.Ct. 1138], for a colorblind America, the rallying cry for civil rights martyrs from William Lloyd Garrison to Martin Luther King. They have also inadvertently resurrected two of the most universilly discredited cases in modern American legal history: Korematsu v. United States (1944) 323 U.S. 214 [89 L.Ed. 194, 65 S.Ct. 1375], and Kirabayashi v. United States (1943) 320 U.S. 81 [87 L.Ed. 1774, 63 S.Ct. 1375]. (See, e.g., Rostow, The Japanese American Cases - A Disaster (1945) 54 Yale L.J. 489.) In those two wartime cases, the high court legitimated the use of race as a basis for governmental action and as a result it allowed the government to stigmatize an entire race by

assuming the disloyalty of all of its members. In University of California Regents v. Bakke (1978) 438 U.S. 265 [57 L.Ed.2d 750, 98 S.Ct. 2733], the opinion of Justice Powell, upon which the majority rely, approved race as a factor that may be considered in school admissions, citing Korematsu and Hirabayashi as authority for the proposition that not all racial or ethnic classifications "are per se invalid."

The approval of consideration of race as a factor in public education is in stark contrast to the enlightened views of the then majority of this court more than three decades ago, prior to emergence of the civil rights movement. In invalidating the state's miscegenation statute, Justice Traynor observed that the "right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals...the constitutionality of state action must be tested according to whether the rights of an individual are restricted because of his race." (Perez v. Sharp (1948) 32 Cal.2d 711, 716 [198 P.2d 17].) To the contention that racial charac-

teristics may be a factor in measuring rights, Justice Traynor wryly observed that "Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." (Id., p. 725.) If the right to marry is the right of individuals, not of racial groups, a fortiori the right to become an educated person through a public school is strictly individual and not subject to approval or rejection because of ethnic characteristics.

The Traynor opinion in Perez was not an aberration. Until a newly constructed majority prevailed in Price, this court had consistently maintained that race or similar characteristics are not a qualification or disqualification for the benefits of society. Chief Justice Gibson declared in James v. Marinship (1944) 25 Cal.2d 721, 739 [155 P.2d 329, 160 A.L.R. 900], that racial discrimination in admission to union membership is "contrary to the public policy of the United States and this state." In Hughes v. Superior Court (1948) 32 Cal. 2d 850, 856 [198 P.2d 885], affirmed (1950) 339 United States 460 [94 L.Ed. 985, 70 S.Ct. 718], Justice Schauer wrote for this court: "because race and color are inherent qualities which no degree of striving...could

meet, those persons who are born with such qualities constitute, among themselves, a closed union which others cannot join. It was just such a situation - an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done- which we condemned in the Marinship case." Again in Sei Fujii v. State of California (1952) 38 Cal.2d 718, 733 [242 P.2d 617], Chief Justice Gibson declared, in striking down the alien land law, that the Constitution could not permit "a classification which operates to withhold property rights from some aliens, not because of anything they have done or any beliefs they hold, but solely because they are Japanese and not French or Italian." In the same case, Justice Carter discussed at length the fallacy "that the race or nationality of a person is a proper basis for the classification of those who are ineligible to own land or other property." (Id., p. 752.) An recently in Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 475 [156 Cal.Rptr. 14, 595 P.2d 592], Justice Tobriner wrote for a majority of this court that an arbitrarily discriminatory employment policy favoring heterosexuals

over homosexuals violated article I, section 7, subdivision (a), of the California Constitution. The foregoing judicial harbingers of a prejudice-free society are no sacrificed on the altar of a new race-consciousness that subordinates the merit of the individual to the common denominator of all who share his or her ethnicity.

The majority opinion is based primarily on a belief that the admission policy at Davis does not on its face offend the federal Constitution. It conveniently overlooks (a) provisions of the California Constitution which are violated by a race-conscious scheme, and (b) facts which demonstrate that the Davis policy, even if some persons may believe it to be constitutional on its face, is unconstitutional as applied.

Justice Paras ably pointed up the state constitutional issue for the Court of Appeal in this case. He wrote, inter alia: "Since here the University's admissions program does not use quotas, it does not violate the Fourteenth Amendment's equal protection clause as viewed by the federal Bakke majority. That does not however end our inquiry, for the California Constitution must also be consulted to determine whether the trial court's decision can and should be supported on independent

state grounds (cf. Serrano v. Priest (1976) 18 Cal.3d 728, 760-768 [135 Cal.Rptr. 345, 557 P.2d 929]). As earlier noted the trial judge rested his decision on the Fourteenth Amendment, and also on California Constitution, article I, section 7, which provides: '(a) A person may not be deprived of life, liberty, or property, without due process of law or denied equal protection of the law. [¶] (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.'

'Most recently in People v. Pettingill (1978) 21 Cal. 3d 231, 248 [145 Cal.Rptr. 861, 578 P.2d 108], our Supreme Court summarized the independent state grounds doctrine as follows: 'The standard to be applied in resolving this issue is also now settled: "in the area of fundamental civil liberties - which includes not only freedom from unlawful search and seizure but all protections of the California Declaration of Rights- we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudica-

tion, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." ([People v.] Longwill, at p. 951, fn. 4, of 14 Cal.3d [123 Cal.Rptr. 297, 538 P.2d 753]; accord, Serrano [v. Priest], at p. 764 of 18 Cal.3d; [People v.] Hannon, at p. 606 of 19 Cal.3d [138 Cal.Rtpr. 885, 564 P.2d 1203].)' (Italics added.)

"Section 7 of article I, is of course included in California's declaration of rights. And even though the right to an education, the subject of our inquiry, is not expressly guaranteed by our Constitution, it is nonetheless 'a fundamental interest' (Serrano v. Priest, supra, 18 Cal.3d at p. 766), as to which '[i]n applying our state constitutional provisions guaranteeing equal protection of the laws we shall continue to apply strict and searching judicial scrutiny...' (id., at p. 767); it is among 'those individual rights and liberties

which lie at the core of our free and representative form of government' (id., at pp. 767-768)."

For the foregoing reason and those stated in this court's six-to-one opinion in Bakke v. Regents of University of California (1976) 18 Cal.3d 34, 49 [132 Cal. Rptr. 680, 553 P.2d 1152] (as affd. in substance in University of California Regents v. Bakke (1978) 438 U.S. 265 [57 L.Ed.2d 750, 98 S.Ct. 2733]), and since classification by race is involved, we are governed by the rule of strict scrutiny. The burden shifts to the state to establish that the use of a racial classification serves a compelling university interest, and that strict scrutiny reveals no reasonable way to achieve the state's goals by means which impose a lesser limitation on the persons disadvantaged by the classification. There can be no doubt that there are persons disadvantaged by the Davis scheme, i.e. those who are not Asian, black, Chicano, native Americans or Filipino - in other words, a majority of the residents of our state are disadvantaged. As will appear, in my opinion the state has failed to meet its burden. The university admission program that is of dubious validity on its face, and the evidence is overwhelming that it totally fails as

applied.

In attempting to meet its burden of proving a compelling state interest, the Davis administration initially denies it gives preferential treatment on the basis of race; it contends that ethnicity is only one factor considered in admissions. Obviously no one takes that sophistry seriously, least of all my colleagues. Indeed, they concede that "the University has placed considerable weight upon racial or ethnic factors" but insist nothing prohibits such a practice. They proceed to offer three conflicting theories purporting to justify giving preference to minority applicants.

The majority opinion raises the issue of "disproportionate underrepresentation of minorities" at Davis. This is a strange new concept that is creeping into legal literature as an apologia for preferential treatment of applicants to public institutions. No one has cited any constitutional authority that requires or permits some kind of statistical parity among applicants on the basis of race, color, sex or national origin; if there can be no proportionate representation, it seems obvious there can be no disproportionate underrepresentation. No valid formula has been devised

to ascertain out of every 100 admittees how many should be male or female; black or white; Catholic, Protestant, Jewish or Buddhist; German, Irish, Italian, Japanese, Mexican, Russian or Swedish. Indeed any such formula would make a mockery of the traditional democratic theory of selection on the basis of individual merit. And it would violate the condemnation of quotas in Justice Powell's opinion in University of California Regents v. Bakke, supra, 438 U.S. 265, upon which the majority heavily lean.

A second, presumably alternative rationale for preferential treatment is reparation for past societal discrimination against ethnic minorities. This theory conceivably would be justified on an individual basis if (a) the minority applicants personally had been the victims of educational discrimination, and (b) the rejected majority applicants, including DeRonde, had personally committed or had been the beneficiaries of acts of discrimination. There is no evidence of either, let alone both, of those elements.[1] There is, as

[1]The incongruity of group reparations rather than individual appraisal can be illustrated by the recent black appointee to President Reagan's cabinet as Secretary of Housing and Urban Development: Samuel Riley Pierce, Jr., the son of a prosperous businessman, resident of a fash-

Professor Bernard Meltzer put it in a related context, an "absence of an individuated connection between remedy, on the one hand, and benefit and injury, on the other..." (Meltzer, The Weber Case (1980) 47 U.Chi.L.Rev. 423, 433.) The burden falls only on those "who have no demonstrable connection to the wrong being redressed." (Kitch, The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus 1979 Sup.Ct.Rev. 1, 11.) Professor Kitch raises this concern: "Will this not be a particular problem for the young, who, having grown up on this side of the civil rights revolution, disassociate themselves from the racism of the old America, and may be surprised to learn that they are asked to pay for it?" (Id. at p. 13.)

A third alternative theory is the vain effort of the university to meet its burden is the purported desire to achieve diversity in the student body. With mere superficial consideration that concept may seem beguiling. It does not, however, withstand strict scrutiny.

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ionable New York suburb, honor graduate of an Ivy League University. Would Davis be justified in rating Secretary Pierce's offspring, because of their color, more deserving of preferential treatment than the offspring of a Caucasian farm worker from the Imperial Valley, a Yugoslav fisherman from San Pedro, or an Italian cobbler from San Francisco's North Beach?

I assume that not even a fanatical advocate of the modern racism would insist that achieving a diverse student body takes precedence over freedom of speech, freedom of religion, freedom of assembly, or the right to due process. Why, one is impelled to ask, should that asserted academic goal - even if desirable - assume a higher priority than the constitutional guarantee of equal protection? This selectivity over which constitutional guarantees are to be preserved, and which sacrificed, arrogates to an elite academic committee an awesome power never previously countenanced.

Professor Alan Dershowitz of Harvard has pierced the facade known as the diversity rationale for preferential treatment of admission applicants. "The incredible staying power of the 'diversity-discretion' model is due as much to the model's marvelous ability to mask genuine institutional criteria, which cannot or will not be publicly articulated, as it is to any deep-seated belief in the value of diversity as an educational disideratum....The raison d'etre for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally,

morally, and politically controversial goals....The 'diversity-discretion' model thus subverts the ideals of responsibility and candor that are the hallmarks of any institution of learning in an open and democratic society." (Dershowitz & Hanft, Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext? (1979) 1 Cardozo L.Rev. 379, 404, 407.)

As Professor Dershowitz points out, even if diversity were a significant factor in enhancing the educational process - which is dubious - it would not follow that race adds to that diversity. "An applicant's potential ability to contribute to the diversity of the student body is uniquely a function of his or her individual experiences, interests, approaches, talents, and characteristics. The prep school black brought up in a middle-class neighborhood by professional parents might contribute far less diversity than a Hasidic Jew from Brooklyn, a Portuguese fisherman from New Bedford, a coal miner from Kentucky, or a recent emigre from the Soviet Union." (Id., p. 419; see also fn. 1, ante.) He therefore found the conclusion inescapable that to give members of a minority race a preference in admis-

sions is simply to reward them for the accident of their race, a fact that has no relevancy to the purported goals of education for service in an profession. In addition, "To reward some persons for the accident of their race is inevitably to punish others for the accident of theirs." (Id., pp. 420-421.)

Finally, there are untried alternative and less drastic methods to achieve the goals purportedly sought by the university. If Davis genuinely seeks to aid those who need assistance in obtaining a professional education, it need not resort to the device of weighing race as a factor, either to favor those of certain specified races or to penalize those who are not included in the preferential categories. For example, Davis could consider the type of program undertaken at Temple University Law School, which in its enrollment weighs consideration "for the disadvantaged, whatever their color or ethnic background, who show exceptional promise.'...'[P]laces are open to just about anyone who can demonstrate that he or she has overcome some significant deprivation, whether it is poverty, language or blindness.'" (Dershowitz, op. cit. supra, p. 423, fn. 132.)

Under that type of program, opportunities open up equally for all victims of deprivation: the black from the inner city, the Chicano from the farm fields, the oriental refugee from Asian communism, the Caucasian whose parents speak a foreign language at home, the student of any ethnic heritage who has conquered physical disability or whose family has existed below the poverty level. The actual handicap or adversity overcome may be a factor in admission consideration, not the color of skin or the surname.[2]

Since none of the theories advanced by the university, and accepted by the majority, meet the burden of the strict scrutiny test, I conclude the admission scheme is unconstitutional under the equal protection clause of the California Constitution, i.e., article I, section 7, subdivisions (a) and (b). We need go no further. Nevertheless I point out in addition that the university admission policy is also unconstitutional as applied. (Brock v. Superior Court (1939) 12 Cal.2d 605 [86 Cal.

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[2]The Harvard program, mentioned with approval by Justice Powell and the majority of my colleagues, is not the paradigm it is represented to be. For a criticism of the Harvard scheme as applied, see Dershowitz, op. cit. supra, page 379 ff. Harvard, unlike Davis, does not specify preferred races.

Rptr. 805]; Startrack, Inc. v. County of Los Angeles (1976) 65 Cal.App.3d 451 [135 Cal.Rptr. 283].)

The majority, in their reliance on the opinion of Justice Powell in the federal Bakke case, appear to accept the university's contention that race is merely one isolated, presumably minor factor in the selection process. The facts are otherwise. The plaintiff presented persuasive evidence that the Davis admissions committee was predisposed to place undue emphasis upon race. Four of the six members of the committee not only were of minority ethnic backgrounds themselves but also were or had been active in organizations dedicated to increasing the number of admittees from their particular racial group. Under the circumstances the committee's objectivity was suspect at the outset.

When to that predisposition are added the figures of actual admissions to Davis for the year when plaintiff applied, and for the immediately preceding years, a clear discriminatory pattern emerges. The DeRonde year was 1975-1976. For that school term 1,138 white males applied for admission; 175, or 13 percent were accepted. At the same time, 458 minorities applied; 133, or 29 percent, were accepted. Thus nearly 46 percent of the

entering class was comprised of minorities.

The foregoing would be unobjectionable if the selected minority members were distinguished by criteria other than race. Again, the facts, regrettably, are otherwise. The mean Law School Admissions Test (LSAT) score for minorities was 551, for white males 676. The mean grade point average (GPA) for minorities was 3.27, for white males 3.57.

For previous years, the figures are even more disparate. In 1972, only 5 percent of white male applicants were admitted, compared to 26 percent of minority applicants. In 1973, the figures were 8 percent of successful white male applicants to 24 percent minority applicants; in that year the mean LSAT was 565 for minority admittees compared to 692 for white male admittees, 3.17 GPA for minorities compared to 3.43 for white males.

If more minority applicants, even though less qualified, could be admitted without impacting on others better qualified, we could remain unconcerned. But the disparate figures, year after year, have had a significant cumulative effect on the student body demography. In 1969-1970, the minority percentage of the total student population was 13.1 percent. By 1972-1973 the

minority percentage rose to 41.6 of the entire student body. Again I stress that the increase would be laudable if, absent consideration of race, the minority admittees had equal objective qualifications, but the figures demonstrate otherwise. Thus while white male applicants scored consistently higher on the LSAT and GPA, their representation in the whole Davis student body decreased in a mere 3 years from 86.9 percent in 1969 to 58.4 in 1972. This demonstrates that race was the most important factor in admission decisions and, I submit, constitutes invidious discrimination, based on race, against white males. The circumstantial evidence is overwhelming that this overt discrimination has been practiced deliberately by the admissions committee acting for the administration of this tax-supported university.

The evidence further includes the following: 74 persons were admitted with lower credentials than this plaintiff, 72 of them minority applicants. In the lower third of the class - an index figure of 2.63 down to 2.24 - 57 admittes were selected, all of them minority applicants, although 1,400 better qualified Caucasians, including plaintiff, were rejected.

Thus the trial court was in error in finding from the evidence that plaintiff would not have been admitted even absent the school's race-conscious program. The plaintiff graduated from Davis as an undergraduate with a 3.47 GPA, 575 on the LSAT and a predicted first year average of 2.70, higher than 72 ethnic minorities admitted. His LSAT was higher than 88 admittees, 78 of whom were minorities. His writing ability score was higher than 36 admittes, 33 of whem were minorities. It seems clear that without the preferential treatment of applicants - acceptance of some and rejection of others on the basis of race - this plaintiff would have been included among the successful applicants in 1975.

There are other relevant matters relating to the unconstitutionality of the Davis scheme as applied. The choice of the particular races entitled to preferential treatment is itself suspect. There is every indication that the races to be included in the preferential group, and those excluded, are determined to a considerable extent by responsiveness to the pressure emanating from well-intentioned but self-serving organizations. For example, no ethnic group

in our society is better adjusted, completely accepted and more successful academically and economically than Asian-Americans.[3] Let me emphasize that I relate this with profound admiration, in view of the tragic record of past legal and extralegal discrimination against those in earlier generations who came or were brought here from the orient. (E.g., see Chuman, The Bamboo People: The Law and Japanese-Americans (1976) p. 72 ff.) The United States Commission on Civil Rights reports that as of 1970 only 13.5 percent of majority males in the United States had completed at least 4 years of college, but 19 percent of Japanese-American males, 25 percent of Chinese-American males and 15 percent of Filipino-American males had a college education. Among females, the percentages of college educated were 8.1 percent for the majority, 11 percent for Japanese-Americans, 17 percent for Chinese-Americans and 27 percent for Filipino-Americans. Even among the lesser numbered groups, the percentages of college-educated exceeded that of the majority: 36.2 of Korean-Americans, 24.4 percent of the new arrivals from Vietnam. (U.S. Commission on Civil Rights, Success of Asian-

[3] Sowell, Ethnic Groups, Prejudice and Economic Progress (Dec. 4, 1980) Wall Street Journal.

Americans: Fact or Fiction: (Sept. 1980) pp. 3-4.)

Economically, Asian-Americans are doing very well.[4] While the mean annual income of employed persons reported for the preinflation year 1970 for majority males was $7,375, it was $8,183 for Japanese-Americans, $7,553 for Korean-Americans, and only slightly less for Chinese-Americans and Filipino-Americans. Every group of employed Asian-American females earned more than Caucasian females (id., p. 11).

None of the foregoing would suggest to any objective observer that Asian Americans require preferential treatment in publicly financed schools of higher learning. Why, then, are they included as a favored racial group? There is a hint of the answer in the Commission on Civil Rights publication cited above. When the Solicitor General filed a brief for the government in the federal Bakke case, he raised questions as to whether Asian Americans should be included in the Davis

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[4] Blacks, too, have experienced remarkable economic growth without special preferences. Ben J. Wattenberg has written that by 1970, "for the first time in the history of the Republic 'middle class' - as measured by criteria of income, occupation, and education - became the adjective to describe the majority of black Americans." (Wattenberg, The Real America (1976) p. 124; see also Rossum, Reverse Discrimination (1980) p. 32 ff.)

quota. The government's position was changed prior to oral argument, the commission concedes, as the result of "extensive lobbying efforts," including remonstrations with both the Justice Department and the White House (id., pp. 22-23).[5]

I do not intend to single out Asian Americans for comment on pressure activities. Every ethnic group engages in similar efforts to assure its inclusion among those who are to be given preferential treatment, and few political, academic - and more recently, judicial-institutions appear to be forthright enough to withstand such importunity.[6] On many a campus, a combi-

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[5]Theologian Michael Novak suggests that ethnic inclusion is a matter of political pressure. While abhorring group entitlement and quotas, he declares that "if the Poles, Czechs, Italians and others are not considered 'official minorities,' it is because they haven't been as skillful in politics as they need to be...if society wants quotas, then everyone should be included." (See Novak, Ethnicity is Not a Dirty Word (Summer 1980) Civ. Rights Q., pp. 24-25.

[6]Professor Bunzel cites a member of Congress who "acknowledged that in the area of affirmative action many of the decisions and policies of the courts and federal agencies do not reflect the feelings of the majority of Americans and have gone beyond the intent of Congress. When asked why he did not draw attention to the problem, he answered candidly, 'I do not want to be called a racist by the civil rights activists.'" (Bunzel, Prepared, Not Preferred (Fall/Winter 1980) Stan. Magazine, p. 60.)

nation of demonstractions, picketing, pamphleteering, sit-ins, walk-outs, and similar agitation - including demands to actually select admittees - by students and nonstudent sympathizers, appears generally and in this instance to have induced the administration to neglect its responsibility to operate a tax-supported institution on a basis of equal rather than preferential treatment.

The briefs submitted in this case are interesting; they reveal how well-meaning organizations will proclaim devotion to principle, but rise above principle when an opportunity for advantage appears. An amicus brief has been submitted by a group entitled Chinese for Affirmative Action, which declares itself dedicated for more than a decade to the laudable objectives of "eradication of racial discrimination against Chinese in American and for the promotion of equal opportunities for all minority groups." A similar amicus brief has been submitted by the Asian American Legal Defense and Education Fund, which declares it was formed to protect Asian Americans in "the right to equal educational opportunity." And the Mexican-American organizations' brief (on behalf of the Mexican-

American Legal Defense and Educational Fund, the National Chicano Council on Higher Education, the Association of Mexican-American Educators, Raza Administrators and Counselors in Higher Education,. the League of United Latin American Citizens, and the National Council of La Raza) indicated their purpose in existing is "the goal of equal educational opportunities for Hispanics." So, too, has a letter brief from the Native American Law Student Association declared its devotion "to equal educational opportunities" for Native Americans and other minorities. (Italics added.) It is significant that every organization purporting to speak for minorities concedes it was formed to press for equal opportunity in education. Not one was organized to demand, as is being sought here, preferential consideration on the basis of race.

With sadness one observes how far these groups have strayed from the wisdom of the great American, Frederick Douglass, born in slavery: "I base no man's right upon his color and plead no man's right because of his color." (4 Foner, The Life and Writings of Frederick Douglass (1955) p. 117.) And from Justice Frankfurter, who declared that in the law what matter "was excellence in

your profession, to which your father or your face was equally irrelevant.'" (Meserve, The Quality of Intellectual Competition (1973) 25 J.Leg.Ed. 378, 383.)

Although it is improper for government or public institutions to allocate upon ethnicity, I emphasize that it is proper in our diverse society for groups to perpetuate their ethnic culture and racial identity. The danger arises when ethnic pride gives away to ethnic chauvinism and ultimately to ethnic demagoguery.

The Governor and several members of his administration have also filed an amicus brief, concluding with the contention that "the First Amendment right to a diverse student body" must prevail over the equal protection clause of the state Constitution. That the First Amendment creates some implied enforceable "right to a diverse student body" will come as a surprise to constitutional scholars. That such a nebulous "right," newly constructed for this litigation, takes precedence over the right of all persons in California to be accorded equal protection and privileges must be rejected as completely untenable. Despite the views expressed in that brief, one would hope that equal protection is alive and well, and still enjoys a high priority, in contemporary California.

Finally, an amicus brief has been submitted in support of the university by the American Civil Liberties Union (ACLU). It raises remarkable arguments based on "equality, academic freedom and independent interpretations of state constitutions." The contentions are irreconcilable with logic, for it is plaintiff DeRonde who asserts he is a victim of inequality and academic obfuscation - not the university - and the Court of Appeal, the opinion of which is superseded by the majority, relied entirely upon the California Constitution. The ACLU, as it did in its unsuccessful attempt to frustrate Alan Bakke's efforts as an individual to win admission to medical school, has once again chosen the uncharacteristic role of supporting an establishment program based on recognition of group characteristics and values as opposed to the right of persons to be treated and evaluated as individuals.

A program of race-consciousness necessarily arouses divisive debates over purported group characteristics. An attitude of racial superiority is candidly expressed by admissions officers of some law schools. The following excerpts from a legal publication (L.A. Daily J. (Nov. 24, 1980)) reveal a typical policy in defense of

special treatment and preferential admissions:

"If we can't have an affirmative action program we would radically reduce the number of minority students we could have,' said...the admissions director at Boalt Hall School of Law in Berkeley. [¶] Last year, Boalt admitted 67 minority students into its entering class. But only seven of those students would have been admitted without an admissions policy that allows a discount on test scores and grades for minority applicants....[¶] 'In the highly competitive process for admission to this school, if those students were not given some special consideration it's unlikely that they could survive that competitive process.'" (Italics added.)

The foregoing program raises a basic question: when the number of available admissions in the public institution is limited, in a constitutional society is there any rational reason to prefer those who cannot survive the competitive process over those who do survive that process? It should be readily apparent that such preference cannot be reconciled with principles of equal protection.[7]

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[7]A logical extension of racial representation in public schools was proposed recently in Cleveland. The administrator of the school district's integration program ob-

As Professor John Hart Ely posed the issue in his book Democracy and Distrust (1980), page 170: "no matter what we call it - a preference, a quota, a quest for diversity - weighing, say, blackness affirmatively necessarily means that others are going to be denied the opportunities in question because they were not born black." And again he observed that "any affirmative action plan that counts blackness affirmatively, even in the context of numerous other factors, necessarily results in the rejection of some applicants who would not be rejected were they black, and in that sence are being turned away 'only' because they are not black." (Id. at p. 257, fn. 102.)

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served that most high school basketball teams in the community were all-black. Integration, he decided, must be a two-way street. Therefore he ordered that by next year two out of five first-team players must be white.

Coaches, and black players particularly, complained bitterly that the principle of ability was being overlooked, that racial representations and quotas should not replace merit in selection of a competitive team.

A federal judge ultimately vetoed this absurd scheme.

Los Angeles high school coaches commendably reacted to the suggestion this way: "We try not to think in terms of the ethnic situation. We play the people who are going to get the job done, regardless of color." (Integration Plan Isn't Likely Here (Dec. 9, 1980) L.A. Times, pt. III, p. 6.)

Since the Reconstruction era, the Constitution has assured all persons that they would receive equal protection. The concept of preferential treatment is contrary to those fundamentals that inspired the unique greatness of the United States. Even more devastating, any scheme involving preference in some races contains the clear message that members of those races are inferior and unable to compete on a basis of equality. The implication in the rationale of the university that whites are inherently superior, other races inherently inferior, and that unless special benefits are given to minority races institutions will inevitably become all-white, brings back haunting memories of the "master race" that most Americans hoped had been forever eliminated by the Second World War.

Theories of master racism are inherently evil, whether evidenced by Nazi Germany's genocide of a religious minority, white-controlled South Africa's apartheid program aimed at a racial majority, or black-controlled Uganda's expulsion of an Indian minority. In the final two decades of the 20th century it is incongruous for racism in any guise to creep by stealth into American academia, and to be not only abjectly accepted, but now stoutly defended. If the principles

of democracy and constitutional equal protection are not recognized in the intellectual environment of taxpayer-supported institutions of higher learning, perhaps one should not be so incredulous when some judges are willing to blindly acquiesce in public benefits being bestowed or withheld in whole or in part on the basis of race.

One of the tragedies of history is that courts of law have placed their stamp of approval on racism. In People v. Hall (1854) 4 Cal. 399, our predecessors on this court upheld a statute that prohibited "black, yellow and all other colors" of persons, whom "nature has marked as inferior," from testifying against whites.

But the cases that will endure, that will pass the test of time, are not those that emphasize race as a benefit or detriment, but those that totally exclude race as a consideration in determining rights. One may ask, rhetorically, which opinion will enjoy the plaudits of posterity, Brown v. Board of Education - which took racial factors out of the public schools - or the majority opinion in Plessy v. Ferguson - which permitted separation on a basis of race? It seems equally inevitable that the perspective of time will relegate Price,

which approved a mathematical racial quota in public employment, to the same historical ashheap that contains such cases emphasizing race as People v. Hall, supra, Fong Yue Ting v. United States (1893) 149 U.S. 698 [37 L.Ed. 905, 13 S.Ct. 1016], and Quock Ting v. United States (1891) 140 U.S. 417 [35 L.Ed. 501, 11 S.Ct. 733, 851].

Opinions such as the majority in this case are, like Price, a radical departure from the spirit of the Constitution of California, which declares that all persons are entitled to equal protection of the laws. The new rule is that what you get depends upon what you are. It is a return to the medieval notion of government by status - and race is a status over which no one has any control. Race cannot be a plus among qualifications, for if it is a plus for some in our society it is necessarily a minus for others. It is arithmetically impossible for race as a factor to be neutral. Its inclusion as a benefit to some constitutes a detriment to those unable, merely by the accident of birth, to enjoy the same advantage. In short, the use of race in the distribution of society's benefits is a form of racism, the anachronistic concept that brains and the ability to use them are related to race.

In a society in which men and women expect to succeed by bettering themselves through individual industry - the traditional work ethic - it is no trivial moral wrong to systemically defeat this expectation by subjecting them to group scrutiny. Any system guilty of rejecting an applicant for public school admission when he or she excels in meeting established objective requirements, in favor of others who are less qualified by the same standards, is immoral; it is also self-defeating in the long run because of its acceptance of mediocrity.[8] One can only hope that ultimately this new egalitarianism will be rejected because, as Barbara Tuchman recently wrote, "the urge for the best is an element of humankind as inherent as the heartbeat."[9]

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[8]The federal bureaucracy has been compelled to recognize the inefficiency resulting from racially inspired hiring policies. "The emphasis on race or sex rather than performance, and the explicit rules and implicit fears by which it is enforced, can wreak havoc in a large organization even after the initial hiring decision is made.... [T]he atmosphere created by defining people in terms of race heavily burdens the possibility of decent working relationships." (Reed, What's Wrong With Affirmative Action (Jan. 1981) Wash. Monthly, pp. 28-29.)

[9]Tuchman, Quality and Non-Quality, San Francisco Chronicle, Review section, (Nov. 16, 1980). Also see Fallon, Merit Conceptions & Antidiscrimination Law (1980) 60 B. U. L.Rev. 815.

Years ago medical doctors attempted to cure morphine addition with doses of heroin. Such efforts were doomed to failure, and worse. Today the university is attempting to cure the remnants of discrimination against minorities with programmed discrimination against the majority. The failure of this misguided social homeopathy is equally predictable. Discrimination - for or against any group - is addictive; the belief that it can be temporary, limited, or controlled is naive and self-deluding.

I quoted Professor Van Alstyne's peroration in my Price dissent. It bears repetition: "one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life - or in the life or practices of one's government - the differential treatment of other human beings by race. Indeed, that is the great lesson from government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding." (Van Alstyne, Rites of Passage (1979) 46 U.Chi.L.Rev. 775, 809-810.)

I would affirm the order of the trial court insofar as it holds the university admissions procedure to be invalid and enjoins the university from utilizing admissions criteria based upon color, sex, race, religion or ethnic origin. I would reverse the order of the trial court denying plaintiff's application for a writ of mandate and denying plaintiff's motion to amend his complaint.

Clark, J., concurred.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GLEN DeRONDE, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Appellants.	S.F. 24145 Super. Ct. No. 32781

The dissenting opinion herein, appearing at page 891 of 28 Cal. 3d, is modified by deleting that portion of the opinion beginning with the fourth full paragraph on page 898 ("When to that predisposition . . .") and ending at the bottom of page 899, and substituting therefor the following:

When to that predisposition are added the figures of actual admissions to Davis for the year when plaintiff applied, and for the immediately preceding years, a clear discriminatory pattern emerges. The DeRonde year was 1975-1976. For that school term 1,117 white males applied for admission; 156, or 14 percent were accepted. At the same time, 494 minorities applied; 142, or 29 percent, were accepted. Thus nearly 48 percent of the entering class was comprised of minorities.

The foregoing would be unobjectionable if the selected minority members were distinguished by criteria other

than race. Again, the facts, regrettably, are otherwise. The mean Law School Admissions Test (LSAT) score for minorities was 562, for white males 676, an average of 114 points higher. The mean grade point average (GPA) for minorities was 3.27, for white males 3.57.

For previous years, the figures are even more disparate. In 1972, only 5 percent of white male applicants and 7 percent of white female applicants were admitted, compared with 33.6 percent of minority applicants. In 1973, the figures were 8 percent of white male applicants and 6 percent of white female applicants, compared with 26 percent of minority applicants; in that year the mean LSAT was 565 for minority admittees compared with 692 for white male admittees, and 3.17 GPA for minorities compared with 3.43 for white males.

If more minority applicants, even though less qualified, could be admitted without impacting on others better qualified, we could remain unconcerned. But the disparate figures, year after year, have had a significant cumulative effect on the student body demography. In 1969-1970, the minority percentage of the total student population was 13.1 percent. By 1972-1973 the minority percentage rose to 41.6 of the entire student

body. Again I stress that the increase would be laudable if, absent consideration of race, the minority admittees had equal objective qualifications, but the figures demonstrate otherwise. Thus while whites generally and white male applicants particularly scored consistently higher on the LSAT and GPA, their representation in the whole Davis student body decreased in a mere three years from 86.9 percent in 1969 to 58.4 in 1972. This demonstrates that race was the most important factor in admission decisions and, I submit, constitutes invidious discrimination, based on race, against whites generally and white males in particular. The circumstantial evidence is overwhelming that this overt discrimination has been practiced deliberately by the admissions committee acting for the administration of this tax-supported university.

MOSK, J.

APPENDIX C

ORDER DUE
March 13, 1981

ORDER DENYING REHEARING

S.F. NO. 24145

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

DeRONDE, Plaintiff and Appellant

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.,
Defendants and Appellants

Newman, J., did not participate. Rattigan, J., sitting under assignment by the Chairperson of the Judicial Council.

Dissent modified

Petition of Glen A. DeRonde for rehearing DENIED.

Mosk, J., is of the opinion that the petition should be granted.

BIRD
CHIEF JUSTICE

APPENDIX D

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

S.F. NO. 24145

GLEN DeRONDE, PLAINTIFF AND APPELLANT, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL., DEFENDANTS AND APPELLANTS.	APPEAL COUNTY YOLO SUPERIOR COURT NO. 32781

The above-entitled cause having been heretofore fully argued, and submitted, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court of the County of Yolo in the above-entitled cause, is hereby reversed to the extent that it (1) declares the university's admissions program is discriminatory and a violation of equal protection of the laws, (2) enjoins the university from any consideration of race, color or ethnic origin in the admissions process at King Hall, and (3) awards costs of suit to DeRonde. In all other respects, the judgment is affirmed. Defendants and Appellants shall recover their costs on appeal.

I, Laurence P. Gill, Clerk of the Supreme Court of the

State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 11th day of February, 1981.

Witness my hand and the seal of the Court,
this 16th day of March, 1981.

Laurence P. Gill, Clerk

BY /s/
G.E. SCHNEIDER, DEPUTY

APPENDIX E

United States Code Service, L. Ed., USCS Constitution, Amendment 14, pgs. 444-445:

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Code Service, L. Ed., 42 USCS §1981, pgs. 262-63:

§1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and

Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. (R. S. §1977.)

United States Code Service, L. Ed., 42 USCS §1983, p. 319:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. §1979.)

United States Code Service, L. Ed., 42 USCS §§2000(e), et seq., pgs. 120, et seq.

§2000(e)-2. Discrimination because of race, color, religion, sex or national origin.

(a) Employers. It shall be an unlawful employment practice of an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unawlful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

. . .

(h) Seniority or merit system; ability tests. Notwithstanding any other provision of this title [42 USCS §§2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system,...

(i) Preferential treatment to Indians living on or near reservation. Nothing contained in this title [42 USCS §§2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not required on account of numerical or percentage imbalance. Nothing contained in this title [42 USCS §§2000e et. seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§20003 et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national

origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2096

In the Supreme Court of the United States

APRIL TERM, 1981

GLEN DERONDE,

Petitioner,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and RONELL L. GORDON, DEAN OF ADMISSIONS, UNIVERSITY OF CALIFORNIA, DAVIS DAVIS SCHOOL OF LAW,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Respondents' Brief in Opposition

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QUESTIONS PRESENTED

1. In a case seeking admission to law school does petitioner present a justiciable controversy where he would have been denied admission in the absence of the assertedly discriminatory admissions criteria, and has already graduated from law school elsewhere?

2. Should *University of California Regents v. Bakke*, 438 U.S. 265 (1978) be reconsidered; if so, is this moot case brought more than three years prior to the *Bakke* decision an appropriate vehicle for such reconsideration?

3. Did the California Supreme Court properly decide that the Davis Law School's admissions program served the interests of diversity and was not unconstitutional as applied?

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No. 80-2096

In the Supreme Court of the United States

APRIL TERM, 1981

GLEN DERONDE,

Petitioner,

VS.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and RONELL L. GORDON, DEAN OF ADMISSIONS, UNIVERSITY OF CALIFORNIA, DAVIS DAVIS SCHOOL OF LAW,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

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Respondents' Brief in Opposition

Respondents, The Regents of the University of California and Ronell L. Gordon, Dean of Admissions, University of California, Davis, Davis School of Law, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the California Supreme Court's opinion in this case entered on February 11, 1981 (Petition for Rehearing denied by Order of March 11, 1981).

OPINION BELOW

The opinion of the Supreme Court of the State of California in this matter is reported as *DeRonde v. Regents of University of California*, 28 Cal.3d 875, 625 P.2d 220 (1981). It is reprinted as Appendix "A" to the Petition.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Proceedings

Petitioner, DeRonde, filed suit in the Superior Court of Yolo County, California, on July 17, 1975. He claimed discrimination against him as an applicant to the School of Law at the University of California, Davis because the school used ethnic minority status as one factor in making admissions decisions. He sought only an order for his admission, requesting that the defendants be compelled "to admit Plaintiff to said law school," that defendants be enjoined "from denying Plaintiff admission to said law school" and that it be declared that defendants "are lawfully obligated to admit Plaintiff to said law school." (C.T. Vol. I, p. 4.)[1] He did not attempt to bring his suit as a class action, as a taxpayer's suit or in any other representative capacity.

The case was tried on August 19, 1975. At trial, DeRonde testified that he had decided to attend law school at the University of San Diego. (R.T. p. 17.) He did enroll at the University of San Diego Law School, graduated in 1978,

1. All record references are to the Clerk's and Reporter's Transcripts filed in the California Supreme Court.

has since passed the Bar, and appears before this Court as an attorney on the petition.[2]

On February 5, 1976, the trial court filed its memorandum of intended decision finding that DeRonde's qualifications were so relatively weak that he would not have been admitted even if the law school had not used ethnic minority status in making admissions decisions. (C.T. Vol. I, p. 168.) Nevertheless, on December 6, 1976, following issuance of the California Supreme Court's *Bakke* decision (*Bakke v. Regents of University of California*, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152 (1976)), the trial court entered judgment enjoining the University from utilizing any admissions criteria based upon race or ethnic origin. (C.T. Vol. II, p. 69.)

The University appealed the trial court's judgment to the District Court of Appeal which automatically stayed its effect. The appeals court then issued an order holding all proceedings on the appeal in abeyance pending this court's disposition of the *Bakke* case. After this Court's June 28, 1978 *Bakke* decision (*University of California Regents v. Bakke*, 438 U.S. 265 (1978)) the instant case was briefed and argued before the Court of Appeal. And on January 21, 1980, the appeals court issued its opinion acknowledging the case was moot but reaching the merits under California's "great public importance" exception to the mootness doctrine. The appeals court decision would have found the law school's admissions program lawful under the federal Constitution as construed by this Court in *Bakke*. It, however, would have affirmed the trial court injunction on the basis

2. Because these facts occurred following trial there are no record citations. A declaration of the registrar at the University of San Diego confirming DeRonde's graduation was filed with the California Court of Appeal.

that the California Supreme Court's *Bakke* decision was trolling as a matter of state equal protection doctrine.[3]

Before the decision of the Court of Appeal became final, the California Supreme Court issued its decision in *Price v. Civil Service Com.*, 26 Cal.3d 257, 161 Cal.Rptr. 475, 604 P.2d 1365 (1980), holding that affirmative action programs lawful under federal *Bakke* are also lawful under California equal protection principles. Nevertheless, the appellate court, in the face of the University's Petition for Rehearing, persisted in issuing its opinion. The California Supreme Court then granted a hearing, thereby vacating the Court of Appeal opinion.

On February 11, 1980, the California Supreme Court issued its opinion, also acknowledging the case was moot, but reaching the constitutional issues "because of the substantial cloud of uncertainty over the University's multiple and widely used procedures;" an uncertainty which was created by the Court of Appeal decision. (28 Cal.3d 875, Petition, App. "A", p. 3.) The California Supreme Court confirmed that the admission program was lawful under federal equal protection principles enunciated in *Bakke,* and that such programs are also lawful under the state Constitution.

The Law School's Admissions Program

In brief, the law school's admissions committee bases decisions to accept or reject applicants on a number of factors in addition to grades and test scores: growth, maturity, and commitment to law study as shown by prior employment, extracurricular and community activities, advanced degrees or studies, personal statements and recom-

3. The California *Bakke* decision was based solely on the federal Constitution and did not mention the state equal protection clause.

mendations; factors which, while no longer present, have affected previous academic grades, such as temporary physical handicaps or disruptive changes in school or environment; wide discrepancies between grades and test scores where there is indicated evidence of substantial ability and motivation; rigor of undergraduate studies; economic disadvantage; and ethnic minority status contributing to diversity. (C.T. Vol. I, pp. 60-70.) The law school's admissions program is summarized in the California Supreme Court's opinion. (28 Cal.3d 875, Petition, App. "A" pp. 4-7.)

The admissions program has no quotas or goals. As might be expected under such a program, the numbers of minorities have fluctuated from year to year: In 1975, the year DeRonde applied, 32.6 percent of the class were minorities; in 1976, 20.3 percent; 1977, 25.9 percent; 1978, 17.5 percent; 1979, 26.69 percent; 1980, 23.26 percent. In the years since the law school was founded in 1966, 24.85 percent of the entering freshmen have been minorities, a figure well below the percentage of minorities in the state's population.[4]

ARGUMENT

1. Petitioner's Graduation from Law School Makes This Case Moot.

This action was brought solely to compel DeRonde's admission to law school. Since he graduated from law school three years ago, the action is moot.[5]

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4. These figures were unavailable at the time of trial and were furnished by the Dean of the Davis Law School for use at oral argument before the California Supreme Court.

5. Both the California Court of Appeal and the California Supreme Court agreed the case was moot, but reached the merits under the "great public interest" exception to the mootness doctrine

This Court declined to decide the similar case of *DeFunis v. Odegaard,* 416 U.S. 312 (1974) because Mr. DeFunis had been admitted to the final term of the final year of law school, holding:

> "The controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.' " (416 U.S. 312, 317, quoting from *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937); see, also, *Roe v. Wade,* 410 U.S. 113, 125 (1973).)

Mootness is even more clearly evident here where petitioner is nearly three years beyond law school and is a practicing attorney.

Mootness is not avoided by any claim for money damages. DeRonde states that his action was brought for injunctive relief and to recover damages. (Petition, p. 5) In fact, his complaint sought *only* an order of admission. (C.T. Vol. I, pp. 1-4.) At the close of trial DeRonde did seek to amend his complaint to include a claim for damages. (C.T. Vol. I, p. 129.) DeRonde failed to submit a proposed written amendment with his motion as required by California law and his motion was denied for this reason as well as because it was not timely. (C.T. Vol. I, p. 168.) The denial of the motion to amend to state a claim for damages was affirmed on appeal. (28 Cal.3d 875; Petition, App. "A", p. 27.) Thus, the only claim ever raised by this case was for an order of admission to the Davis Law

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under California law. State exceptions to mootness, however, are immaterial to a claim of mootness before this Court which "is a federal one which a federal court must resolve before it assumes jurisdiction." (*DeFunis v. Odegaard,* 416 U.S. 312, 316; *North Carolina v. Rice,* 404 U.S. 244 (1971).) In any event, the question of great public importance in California was the question of whether the state Constitution established a different standard than the federal *Bakke* decision, an issue now settled and not before this Court.

School. That claim was probably moot at the time of trial when Mr. DeRonde announced his intention to go to law school elsewhere; it has certainly been rendered moot by his graduation from law school three years ago.

2. There Is Also No Justiciable Controversy Because No Injury To Petitioner Can Be Redressed by Resolution of His Claim.

A plaintiff does not state a controversy justiciable before this court unless he has " 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." (*Warth v. Seldin*, 422 U.S. 490, 498-499 (1975), quoting from *Baker v. Carr*, 369 U.S. 186, 204 (1962).) There is no personal stake unless plaintiff demonstrates that the injury to himself is "likely to be redressed by a favorable decision." (*Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth v. Seldin, supra*, at 498.)

DeRonde sued only as a disappointed applicant. Since he decided to attend law school elsewhere, and has since graduated, a finding that the law school admissions program was constitutionally defective would redress no injury to him.

Moreover, the trial court expressly found that "Plaintiff [DeRonde] would not have been admitted to the law school even if the special admissions program had not been in operation and that, therefore, the denial of his application was not as a result of the special admissions program wherein mitigating factors to low indices were considered for ethnic minorities." (C.T. Vol. I, p. 168.) Thus, even if petitioner had maintained a case or controversy by claiming injury which could be redressed, consideration of the claim would be foreclosed here because the admissions criteria

he challenged resulted in no injury to him. (*Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252 (1977).) In *Arlington Heights*, plaintiffs challenged a zoning decision by the village of Arlington Heights on equal protection grounds. In language equally applicable here, this court reasoned that where "the same decision would have resulted even had the impermissible purpose not been considered," complainant "no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose" and "[i]n such circumstances, there would be no justification for judicial interference with the challenged decision." (429 U.S. 252, 271 n. 21 (1977); see also, *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 (1977); 438 U.S. 265, 279-280 (1978), Op. of Powell, J.: *Henson v. University of Arkansas*, 519 F.2d 576, 577-578 (8th Cir. 1975).)

3. There Is No Occasion for Reexamining This Court's Decision in Bakke.

A. THE ONLY FEDERAL ISSUE WHICH MIGHT BE REVIEWED IS THE EQUAL PROTECTION ISSUE ALREADY ADDRESSED IN BAKKE.

Petitioner claims that federal questions are presented under 42 U.S.C., § 1981, 42 U.S.C., § 1983, and 42 U.S.C., § 2000(e) [sic] as well as under the equal protection provisions of the Fourteenth Amendment.

In fact, however, DeRonde's complaint sought only an order for his admission under the equal protection clauses of the state and federal Constitutions and under Title VI of the Civil Rights Act of 1964 (42 U.S.C., § 2000d). (C.T. Vol. I, pp. 1-4.)

The announced intended decision of the trial court, its findings of fact and conclusions of law, and its judgment are based solely upon state and federal equal protection. (Decision: C.T. Vol. I, pp. 167-173; findings and conclusions: C.T. Vol. II, p. 64-68; judgment: C.T. Vol. II, p. 69.)

DeRonde made no attempt before the trial court to revive the Title VI issue asserted in his complaint and the issue was not addressed on appeal.

Sections 1981 and 1983 are not mentioned in the complaint. The record does disclose one passing reference to these statutes: DeRonde's memorandum of points and authorities in support of his unsuccessful motion to amend his complaint for damages asserted, irrelevantly, that claims for damages may be made pursuant to these statutes. (C.T. Vol. I, pp. 130-132.) But DeRonde never stated a claim under sections 1981 or 1983, these statutes were not addressed by any lower courts, and they present no issue for review.

Thus, assuming there was a case or controversy, it would involve the same question previously reviewed in *Bakke:* Whether the equal protection clause of the Fourteenth Amendment bars any and all consideration of race in making admissions decisions to highly selective graduate and professional schools.

B. BAKKE APPROPRIATELY DETERMINES THE EQUAL PROTECTION ISSUE PRESENTED.

University of California Regents v. Bakke, supra, provided institutions of higher education with needed and sufficient legal guidance regarding race-conscious admissions programs. For example, following the *Bakke* decision, the President of the University of California issued "Guidelines on Fair and Equal Opportunities to Participate in Undergraduate and Graduate Programs" with reference to the implications of *Bakke.* These guidelines are attached to this brief as Appendix "A". We call to the Court's particular attention the materials having to do with graduate admissions including that appearing under the headings "General Criteria and Evaluation" (pp. 4-5), "Diversity of the Student Body" (pp. 5-6), and "Procedures" (p. 6).

At the University of California with its five medical schools, three law schools and various other highly selective professional and graduate programs where race is considered as a factor in admissions, there have been no *Bakke*-type cases filed since the issuance of this Court's decision in *Bakke*. The national experience is in accord. To our knowledge there has been only one *Bakke*-type case since the issuance of the *Bakke* decision. It was an action brought by a rejected applicant to the School of Medicine of the University of Washington. The trial court and the Supreme Court of Washington found the admissions program valid under the rule of *Bakke*. (*McDonald v. Hogness*, 92 Wn. 431, 598 P. 2d 707; cert den., ... U.S. ....., 64 L.Ed.2d 238 (1980).)

The *Bakke* decision has served well the interests of higher education and of society in general. The instant case, brought and tried three years prior to this Court's decision in *Bakke*, presents no occasion for reexamining it.

4. The California Supreme Court Properly Found the Admissions Program to be Lawful Under Bakke.

A. PETITIONER'S CLAIM THAT THE DAVIS LAW SCHOOL ADMISSIONS PROGRAM IS INVALID FOR ITS FAILURE TO ALLOW FOR THE COMPETITIVE CONSIDERATION OF ALL RACES IS WITHOUT MERIT.

Petitioner appears to claim that *Bakke* requires a race-attentive admissions program to give affirmative consideration to applicants of all races and that the Davis law school program is infirm because it identifies five racial or ethnic minority groups for affirmative consideration (Petition, pp. 29-34).

If petitioner's argument is that racial and ethnic diversity is the only diversity sought, he misconceives the program. As stated in the school's application bulletin for 1975-76, the year DeRonde applied:

> "The Admissions Committee is seeking law students of demonstrated academic ability, as evidenced by LSAT scores and the undergraduate grade-point average (GPA). However, with 3,000 applications projected for the 1975 entering class of 175, the Admissions Committee will be looking beyond the LSAT and GPA for special qualities in its applicants. The committee is seeking law students of diverse backgrounds, taking into consideration economic factors, advanced degrees or other advanced studies, significant work experience, and extracurricular and community activities during and after college years. The growth and maturity of the applicants and their commitment to law study are major concerns." (C.T. Vol. I, p. 93.)

And,

> "The students and faculty of the UC Davis School of Law recognize the desperate need for minority lawyers. The school, therefore, actively solicits applications from Asian, Black, Chicano, Native American and Filipino students interested in coming to King Hall." (C.T. Vol. I, p. 96.)

As observed by the California Supreme Court, "This grouping [Asians, blacks, Chicanos, native Americans and Filipinos] generally corresponds to the ethnic categories defined by the federal Equal Employment Opportunity Commission in its public reports." (28 Cal.3d 875, 881, App. "A", p. 5.) Although these groups were identified as those contributing to diversity on the basis of "ethnic minority status," the diversity sought by the school was more general: an applicant of any race could be assigned a plus for his or her contribution to diversity of the class based upon the applicant's particular background, irrespective of race or ethnicity.

If petitioner's argument is that a race-attentive admissions program must give "special" consideration to applicants of all races, it falls of its own weight. To give "special" consideration to all on the basis of race is to give special consideration to none.

In any event, race-attentive affirmative action programs by their nature focus on members of identified underrepresented groups. That a program is limited to such groups is not a basis for invalidity. (*Fullilove v. Klutznick*, ... U.S. ....., 65 L.Ed.2d 902 (1980).)

B. THE DAVIS LAW SCHOOL ADMISSIONS PROGRAM IS VALID AS APPLIED.

DeRonde asserts that the Davis law school admissions program is invalid as applied. We are uncertain what is meant by this argument, but the Davis law school admissions program is clearly valid under this Court's decision in *Bakke*. The program is designed to promote diversity. Race is only one of many factors considered—others being work experience, breadth of activities, commitment to the law, evidence of overcoming handicaps and maturity. The program involves no set-aside of places or quota. There is a single admissions committee and a unitary process under which all applicants are eligible to compete for all places in the class. It would be difficult to imagine an admissions program—at least one devised before the *Bakke* decision—more closely resembling that of Harvard College which was held up as a model of constitutional race-conscious admission programs in *Bakke*.

Nor can there be any serious question as to the bona fides of the administration of the program. As observed by Justice Richardson writing for the California Supreme Court:

"The record before us is barren of any evidence showing that the University was deliberately using the challenged admissions procedure either as a 'cover' for a quota system or as a means of systematic exclusion of, or discrimination against, white male applicants such as DeRonde. The trial court made no such finding. Without proof of such an intent, the University's procedures must be upheld against a claim of unlawful racial discrimination even if accompanied by some evidence of a disproportionate impact. [Citations.]

"Moreover, the evidence fails to support a finding of such disproportionate impact." (28 Cal.3d 875, 887-888.)

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

Office of the President
June 12, 1979

UNIVERSITY OF CALIFORNIA GUIDELINES ON FAIR AND EQUAL OPPORTUNITIES TO PARTICIPATE IN UNDERGRADUATE AND GRADUATE PROGRAMS

If the American promise of equality for all is to be fully realized, barriers to equal opportunity must be attacked wherever they continue to stand. In no area of American life is the removal of remaining barriers more crucial than in education. Because education is the principal channel to the mainstream of society in America, educational opportunity must be equally available to all.

Soon after becoming President, I emphasized the University's commitment to this principle in the following statement:

> We are determined to provide new opportunities for members of groups who have been underrepresented in higher education, both because it is right and because the entire society ultimately benefits from the fullest possible realization of individual potential.

The University of California has historically pursued a policy of nondiscrimination in all of its operations. Experience has proven that this policy, while essential, is not alone sufficient to assure that all individuals will have an equal opportunity to participate in the University's undergraduate and graduate programs. Experience has also demonstrated the effectiveness of affirmative action efforts by the University as a whole and by campuses and academic units to extend educational opportunity to groups which

have been underrepresented at various levels of higher education. The largest of these groups are ethnic minorities and women. The University also recognizes the needs of those who have been educationally disadvantaged because of physical handicap, or economic status.

Participation in undergraduate programs, and eventually in graduate programs as well, may be limited by inadequate pre-college academic preparation or by lack of motivation or encouragement to seek out such opportunities. The crucial long-term step in providing greater participation by groups now underrepresented in these programs is to assure that more students from these groups receive better academic preparation early in their schooling and more encouragement to view higher education as a realistic possibility. The University of California is committed to continuing its active and cooperative role in that broad effort.

Currently there are students seeking admission to the University's undergraduate and graduate programs whose prior educational experience as members of underrepresented groups has placed them at a disadvantage in terms of quantitatively measured academic achievement. Some of these students clearly have the potential to participate successfully in these programs, to their own benefit, to that of their fellow students, and to the benefit of society as a whole. Special forms of University assistance are both necessary and appropriate for these students.

Society's ultimate objective must be to reach the point where special efforts to encourage the enrollment of any particular groups of students are no longer necessary. But the day when all students have equal access to pre-college educational opportunities is not yet here, and the University cannot simply await its arrival. Nor can society

afford to lose the potential contributions of present generations of students who could succeed in their undergraduate and graduate studies if given some encouragement and assistance by the University.

Accordingly, I am establishing the following University *Guidelines,* which draw upon provisions of the California Master Plan for Higher Education, current legal decisions and their interpretation, experience here and at other institutions, and recommendations and suggestions from the University of California community.

I. *Purpose*

These University *Guidelines* are intended to provide guidance and encouragement for vigorous and concerned efforts throughout the University to assure fair and equal opportunity to participate in both undergraduate and graduate programs, and so to increase the enrollments of groups now underrepresented at some University levels, including ethnic minorities, women, and the physically handicapped.

II. *Outreach and Recruitment*

A. *Pre-college level*

At the pre-college level, elementary and secondary schools have primary responsibility for preparing students for higher education, but the University recognizes an important measure of responsibility for cooperative activities in several areas:

1. Professional training of elementary and secondary teachers—The University should continue to provide and promote training which imparts teaching skills and also sensitivity to the learning problems and the abilities and potential of students of diverse cultural backgrounds.

2. Assistance with special learning problems—The University should continue and expand its cooperative programs with secondary schools to overcome learning problems that affect students' preparation for higher education, including writing and mathematics skills.
3. Outreach programs—The University should continue and expand its outreach programs, including summer programs on University campuses and programs in the State's high schools and junior high schools to encourage students from underrepresented groups to consider entering higher education and to take the necessary courses to improve their eligibility for higher education.

B. *Undergraduate level*

1. The University should continue and expand its outreach programs in the State's community colleges to encourage students from underrepresented groups to continue their education to completion of the bachelor's degree.
2. The University should continue and expand its efforts to encourage undergraduate students from underrepresented groups to consider entering graduate studies. The University should seek to identify undergraduates at the University, in the California State University and Colleges system, and in other institutions who show potential for graduate work, inform them of opportunities, and assist them to apply to graduate programs.

III. *Admissions*

A. *Undergraduate*

1. The California Master Plan for Higher Education provides that the University of California shall admit to its undergraduate studies the top 12½ per-

cent of the State's high school graduates. The University establishes systemwide undergraduate admissions requirements which are designed to allow that proportion of the State's high school graduates to qualify for admission. Admissions requirements, recommended by the Academic Senate and adopted by The Regents, are based upon completion of required courses, grade point averages, and aptitude and achievement test scores.

2. The University recognizes that these primarily quantitative data may not accurately measure the potential of some students for university-level work. Accordingly, The Regents provide for admitting a percentage of first-time freshmen (currently 6 percent) and of advanced standing students (currently 4 percent) each year as exceptions to the regular admissions requirements.

3. The University should continue to study and refine its admissions practices and follow the performance records of students, both those admitted under the regular requirements and as exceptions to these requirements, in order to improve its ability to identify applicants with potential for university-level undergraduate studies.

B. *Graduate*

The Regents have delegated to the Academic Senate, subject to Regental approval, the responsibility for determining conditions for admissions. Although requirements for undergraduate admissions and minimal standards for graduate admissions apply systemwide, graduate and professional admissions and requirements are to a large degree determined by campus Graduate Councils and faculties of academic departments and professional schools. Major responsibility for recommending which applicants are selected for admission rests with the faculty of each graduate or professional program.

Lack of postgraduate educational opportunity may be an insurmountable barrier to many careers. Despite innate ability or experience, which in some other areas may partially compensate for inadequate education, the absence of formal postgraduate academic or professional education can absolutely debar an individual from important career areas and from related opportunities for service and leadership. And it deprives American society of the unique contributions that individual might otherwise make to his or her chosen career field and to broader areas of service and leadership.

At the same time that postgraduate instruction is an essential portal, its availability may be limited in at least some fields by factors of cost, perceived social need, or lack of appropriate faculty or facilities.

Accordingly, it is of the utmost importance that opportunities for postgraduate academic and professional education be made available on a fair and equal basis to all.

1. *General criteria and evaluation*

   a. The primary general criterion should be the applicant's potential to complete the program successfully.

      In a program where places are available for all qualified applicants, satisfaction of this primary general criterion and of whatever additional campuswide or departmental criteria a campus Graduate Council or the faculty of a program may elect to apply should be sufficient for admission.

      Grades and test scores alone are not necessarily accurate predictors of potential to complete a program successfully. Grades and test scores serve best as predictors of academic success at the lower and upper ends of their ranges. Between those ends, grades and test scores need to be interpreted in the light of other evidence of potential. Accordingly:

(1) Lower and upper limits for grades and test scores may be established, below and above which applicants may be rejected as unqualified or deemed potentially able to complete the program successfully on the basis of grades and test scores alone. Care should be taken to set these limits at levels where consideration of other evidence of potential would be unlikely to change the outcome, particularly at the lower limit which would automatically eliminate some applicants from further consideration.

(2) For all applicants whose grades and test scores fall between the above limits, those quantitative data should be interpreted in the light of other evidence of potential to complete the program successfully, including further evidence of motivation and persistence, information about employment during student years, and other information which may indicate a potential to overcome the handicap of prior educational disadvantage. Because of barriers and obstacles often associated with race, sex, and physical handicap, status as a member of such an underrepresented group may be regarded as indicative of the need for special scrutiny to determine whether the record accurately reflects the applicant's academic potential.

b. In programs where the total number of fully qualified applicants (those with the potential to complete the program successfully) exceeds the number of available places, final selection of applicants for admission from among those qualified should be based upon two additional general criteria:

(1) The applicant's probable future contribution to his or her intended academic or professional field.

(2) The applicant's probable contributions to the educational enrichment of the program.

Academic and professional fields need a variety of talents and abilities. One need common to most fields is outstanding intellectual ability. From among the group of fully qualified applicants, therefore, some applicants may be selected for admission on the basis of their high grade points and test scores. Other qualified applicants should be selected for admission on the basis of their academic potential in combination with other talents and characteristics important to the particular field, such as leadership, creativity, human relations skills, or demonstrated interest in and commitment to community service.

A class composed of some students with outstanding intellectual ability and some with a variety of other important talents and characteristics will enrich the educational experience of all of the students in the program.

c. For purposes of evaluation in accordance with these criteria, applicants should be requested to submit grade records, test scores, and other pertinent information broadly descriptive of their background, abilities, and potential. Such information may vary from one program to another but might include a personal statement, letters of recommendation, and information on employment, extracurricular student activities, and community service. The school or department may also request a personal interview. (Requests for information beyond grade records and test scores may be delayed until determination has been made that the applicants' grade points and test scores are above the lower limit established for the program.)

2. *Diversity of the student body*

In view of the needs of the field and the program, an appropriately diversified student body should be an important and explicit goal of the admissions process.

a. In programs where places are available for all qualified applicants, the composition of the pool of qualified applicants may in some cases unduly limit the diversity of the student body. In those programs, vigorous efforts should be made to attract a more broadly diversified applicant pool.

b. In programs where the number of qualified applicants exceeds the number of available places, the selection of qualified applicants for admission should be designed to achieve a student body with a diversity of talents and characteristics appropriate to the needs of the field and the educational enrichment of the program. Sex and ethnic minority status may be taken into account where appropriate in establishing such diversity.

Even in programs where there are large numbers of applicants, further efforts to attract a more broadly diversified applicant pool may be necessary in order to achieve the appropriate degree of diversity in the student body.

3. *Procedures*

Admissions procedures for professional schools may differ substantially from those for academic departments, and procedures for programs with places for all qualified applicants may differ from those with limited places and large numbers of applicants. In all cases, the following should be observed:

a. Procedures should be designed and administered to be fair to all applicants.

b. Procedures should be publicized and criteria for admissions should be specified in documents available to all applicants and others who are interested.

c. Where minimal levels for grades and test scores are to be employed, either the levels to be used or (if that cannot be determined in advance) the levels used in the prior year or years should be cited in the admissions documents.

d. When selection from among a number of qualified applicants for a limited number of places must be made, decisions should be made on the basis of a comparative assessment of applicants.

IV. *Student Support Services*

The offer of admission and its acceptance should constitute an understanding between the student and the University that each will strive to assure the student's academic success. To that end, and within the limitations of available resources, the University should offer financial aid, counseling, academic assistance, and other support services. These services should be available to both undergraduate and graduate students.

V. *Student Affirmative Action Plans*

The University has already adopted a *Student Affirmative Action Plan for Undergraduates* (May 1978) and is now preparing a parallel plan for graduate students. These plans point out barriers which still limit equal educational opportunity for some students and set forth proposals for further ways in which the University can help to eliminate these barriers. The University should continue to carry out these plans, revising the plans as experience may prove desirable.

VI. *Evaluation of Progress*

In order to be able to evaluate its progress toward greater equality of educational opportunity, to identify problems, and to improve the effectiveness of its affirmative action efforts, the University should systematically collect relevant data on admissions, support services, student performance, and subsequent career paths.

VII. *Recognition of Faculty Contributions*

The effectiveness of these *Guidelines* depends heavily upon the assistance of the University's faculty. Outreach programs, admissions, and student support services all require faculty time, thought, and creativity. These should be appropriately recognized as contributions to university service for faculty members being considered for appointment, promotion, or merit salary increases.

David S. Saxon
President